EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 1813

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE COEUR D'ALENE LUMBER COMPANY (a Corporation),

Plaintiff in Error,

vs.

GEORGE GOODWIN,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Records of U. S. Circuit
Court of Appeals
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No. 1813

UNITED STATES CIRCUIT COURT OF APPEALS

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THE COEUR D'ALENE LUMBER COMPANY (a Corporation),

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

R. E. McFARLAND, Esq., Coeur d'Alene, Idaho,
Attorney for Plaintiff in Error.

R. T. MORGAN, Esq., EDWIN McBEE, Esq., Coeur d'Alene, Idaho,
Attorneys for Defendant in Error.

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Summons.

The State of Idaho, To Coeur d'Alene Lumber Company, a corporation, the above-named defendant:

You are hereby notified that a complaint has been filed in the office of the Clerk of the District Court of the First Judicial District of the State of Idaho, within and for the county of Kootenai, at Rathdrum, in said county and State, by the above-named plaintiff against you, the said defendant, a copy of which said complaint is hereto attached, made a part hereof, and served herewith.

You are hereby directed to appear and answer to said complaint within twenty (20) days after the service hereof, if served within Kootenai County and the First Judicial District of the State of Idaho, and within forty (40) days if served elsewhere (exclusive of the day of service).

And you are further notified that unless you so appear and answer as above directed, the plaintiff will take judgment for the sum demanded in the complaint, to wit, the sum of Twenty Thousand Four Hundred ($20,400.00) Dollars, and the costs of suit.

Given under my hand and the seal of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, this 20th day of April, A. D. 1908.

[Court Seal] T. L. QUARLES,
Clerk.
By Jas. A. Foster,
Deputy.

R. T. MORGAN,
Residence and postoffice address: Coeur d'Alene, Idaho,
and
EDWIN McBEE,
Residence and postoffice address, Rathdrum, Ida.,
Attorneys for Plaintiff.

Complaint [First].

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

COMPLAINT.

Plaintiff complains and alleges:

I.

That at all the times mentioned herein the defendant, Coeur d'Alene Lumber Company, has been and now is a corporation organized under the State of Washington and owning and operating a sawmill at Coeur d'Alene, Kootenai County, State of Idaho.

II.

That in May, 1907, the defendant hired and employed the plaintiff to work for the defendant in its said sawmill; that when the defendant so hired and employed the plaintiff the plaintiff had never done any work in or about a sawmill and was wholly inexperienced and ignorant in and about such work and as to the machinery and operation of the sawmills, and so informed the defendant;

That for about one month immediately after plaintiff had been so employed by defendant, plaintiff was employed by defendant on the log deck in getting logs out of the water and to defendant's mill.

III.

That about June 1, 1907, Herman Saltsider, who then and there was the foreman, manager or superintendent of said defendant, having full control of the hiring and discharging of the employees of the defendant in and about said mill, and of the kind, character and place of performance of the work and labor of said employees, and the control, management and custody of the machinery used in and about said mill and the kind and character of work to be done and performed therein, then and there acting in said capacity and as such foreman, manager and superintendent for defendant requested and directed the plaintiff to change from the place where he had been working as aforesaid on said log deck and to work and labor for the said defendant in the capacity known in sawmills and among sawmill laborers as "tailing the edger"; that the duties of said labor so requested by said defendant to be performed by plaintiff required plaintiff to assume a station on said sawmill back of what is known as the edger-table, at which table the boards sawn from the sawlogs in said sawmill have their edges or sides trimmed to suit the convenience and requirements of the management of said sawmill, and required plaintiff to remove from and about said edger-table, the waste matter resulting from the edging of the said lumber, which said waste matter is known as "edgings"; that said edger-table is a long and wide table on which several boards could be placed at one time and across which said boards were conveyed by rollers to another table in the rear of and beyond the station where plaintiff was directed to work;

That plaintiff was required to stand in a space about two feet wide and three feet long at the rear of said edger-table, and on each side of which station boards from said edger-table were conveyed by rollers to the table beyond, and it was plaintiff's duty in such employment and in such position to remove the said waste products or edgings from the edger and deposit them in a conveyor underneath said tables in which they were carried away;

That acting under the direction of said manager, Saltsider, plaintiff then and there commenced to work at said occupation heretofore referred to as "tailing the edger" and continued so to work there until plaintiff was injured as hereafter stated.

IV.

That said work which plaintiff did and which plaintiff was directed to do by the said defendant as aforesaid was dangerous work; that the place where plaintiff was directed to stand in performing said work and labor was not large enough to permit plaintiff or any laborer to stand therein and work and labor with safety to himself; that the work required by defendant of the plaintiff as aforesaid was too great for one person to perform, and in the attempted performance thereof was fraught with great danger to plaintiff or any person engaged in the operation of such work; that the plaintiff at said time was ignorant of the danger attendant upon the performance of said labor, and was ignorant and inexperienced as aforesaid, and did not know or appreciate the danger incident to the performance thereof, but that the defendant at all of said times and at the time

of putting plaintiff to work as aforesaid did know and fully realize that said work was dangerous, and that the labor required was too great to be performed by one ordinary man, in safety, and did know that the place provided for plaintiff to work was not sufficiently large to enable plaintiff to work with safety to himself; but that said defendant did not, nor did any of its agents or officers, give plaintiff any instructions whatever as to the dangers attendant upon such work or inform him of the dangerous place in which he was required to work or of the fact that more work was required of him than could be safely performed by one laborer. That the mill of defendant in which plaintiff was put to work as aforesaid is a very large mill, having a large capacity for the manufacture of lumber, and that it is the custom in mills of such capacity universally to have more than one man employed to do the work required to be done by plaintiff as aforesaid, all of which facts were known to defendant but unknown to plaintiff; that the person who had been employed in the performance of said duty prior to the employment of plaintiff by defendant had quit and refused to work longer at said work for the reason that the labor thereof was too great for one man to perform and had so notified the defendant, but that plaintiff had no knowledge of said facts and was not notified thereof by defendant.

That plaintiff at the time of said accident was of the age of twenty-six years and had not had ordinary experience, and did not at said time have even ordinary knowledge of dangers incident to and connected

with the operation of sawmills in general and of the work as aforesaid in particular, and had not the ability and understanding to know and appreciate the dangers of said position or even common ordinary dangers incident to and in connection with the operation of sawmill machinery and of machinery in general, and then and there knew no more about such machinery, or any machinery, than a child of the age of fourteen years and of ordinary intelligence.

V.

That on or about June 9, 1907, and after plaintiff had been employed for eight days tailing the edger as aforesaid, and while plaintiff was in the discharge of his duties, as aforesaid, and exercising reasonable care and caution, and without any fault, negligence or carelessness on the part of plaintiff, plaintiff's right leg was caught between a board passing from the edger-table to the table with live rollers beyond the place where plaintiff was standing, and plaintiff was pushed and dragged by means thereof until his leg was fastened and pinioned against the said table beyond said edger-table and pinched and crowded between said table and the said board, and the flesh, muscles, tendons, bones and blood vessels of plaintiff's said right leg were bruised, wounded, lacerated and mangled in a most shocking and painful manner and the cords and ligaments of said leg were so cut, bruised and mangled that plaintiff was forced to quit said employment, as aforesaid, and plaintiff went to a hospital and received treatment therein at the town of Coeur d'Alene and afterwards at other places, and was in the care of physicians until finally in Decem-

ber, 1907, after two operations had been performed in a vain attempt to cure said injury, it became necessary to amputate and cut off said leg in order to save plaintiff's life, and in December, 1907, said leg was amputated and removed at a point about two inches above the knee joint; that said amputation of said leg was caused and made necessary by the injury received by plaintiff as aforesaid in the mill of defendant; that at the time of receiving said injury plaintiff was standing in the place in which he was directed to stand by said manager, Saltsider, in the performance of the duties required of him as aforesaid, and that said leg was caught and injured as aforesaid by reason of the negligence and carelessness of the said defendant in providing a place of insufficient size for plaintiff to stand in the performance of his said labor, and in requiring plaintiff to do more work than should be required of one laborer as aforesaid and as well as on account of the failure of defendant to warn plaintiff of the danger incident to said place and the performance of said labor, and said board which caught plaintiff's leg as aforesaid was a very wide board and came across said table and projected and filled a large portion of the space provided for plaintiff to stand in and left no remaining room sufficient for plaintiff to stand and perform the labor required of him;

That at said time of receiving said injury, plaintiff, on account of his inexperience at such work and his general ignorance and inexperience, did not understand or appreciate the danger of said position and of said labor, and was not nor had not at any time

been warned thereof by the defendant; that the defendant at all times was aware of said danger as well as of the inexperience and ignorance of the defendant;

That the shock produced by said injury was of a very painful character and has already shattered plaintiff's entire nervous system, and has ruined plaintiff's physical health permanently; that he has suffered and still suffers great pain and has been and is unable to sleep or rest, that his injuries as aforesaid are permanent and lasting; that plaintiff's entire usefulness is hopelessly impaired and destroyed.

That plaintiff has been compelled to pay and has paid hospital fees and surgeon's fees and expenses in connection with the treatment and amputation of said leg in the sum of Four Hundred ($400.00) Dollars;

That at the time of said accident plaintiff was in sound health, strong and robust, and was earning and capable of earning $3.50 *Dollars* per day.

VI.

That by reason of the injury as aforesaid plaintiff has been damaged in the sum of Twenty Thousand ($20,000.00) Dollars.

Wherefore, plaintiff prays judgment against the defendant for the sum of Twenty Thousand Four

Hundred ($20,400.00) Dollars and for the costs of this action.

R. T. MORGAN,

Residence and Postoffice Address: Coeur d'Alene Idaho,

and

EDWIN McBEE,

Residence and Postoffice Address: Rathdrum, Idaho,

Attorneys for Plaintiff.

State of Idaho,
County of Kootenai,—ss.

George Goodwin, being first duly sworn, deposes and says:

That he is the plaintiff named in the foregoing complaint; that he has read said complaint, knows the contents thereof, and that the same is true of his own knowledge except as to the matters and things therein stated to be upon information and belief, and that as to those matters, he believes it to be true.

GEORGE GOODWIN.

Subscribed and sworn to before me this 18th day of April, A. D. 1908.

[Notarial Seal] MARGARET E. MAIN,

Notary Public.

[Endorsed]: Filed April 20, 1908, at 9 o'clock A. M. T. L. Quarles, Clerk, District Court. By Jas. A. Foster, Deputy.

Complaint [Second].

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

COMPLAINT.

Plaintiff complains and alleges:

I.

That at all the times mentioned herein the defendant, Coeur d'Alene Lumber Company, has been and now is a corporation organized under the State of Washington and owning and operating a sawmill at Coeur de'Alene, Kootenai County, State of Idaho.

II.

That in May, 1907, the defendant hired and employed the plaintiff to work for the defendant in its said sawmill; that when the defendant so hired and employed plaintiff the plaintiff had never done any work in or about a sawmill and was wholly inexperienced and ignorant in and about such work and as to the machinery and operation of the sawmills, and so informed the defendant;

That for about one month immediately after plaintiff had been so employed by defendant, plaintiff was employed by defendant on the log deck in getting logs out of the water and to defendant's mill.

III.

That about June 1, 1907, Herman Saltsider, who then and there was the foreman, manager or superintendent of said defendant, having full control of the hiring and discharging of the employees of the defendant in and about said mill, and of the kind, character and place of performance of the work and labor of said employees, and the control, management and custody of the machinery used in and about said mill and the kind and character of work to be done and performed therein, then and there acting in said capacity and as such foreman, manager and superintendent for defendant, requested and directed the plaintiff to change from the place where he had been working as aforesaid on said log deck and to work and labor for the said defendant in the capacity known in sawmills and among sawmill laborers as "tailing the edger"; that the duties of said labor so requested by said defendant to be performed by plaintiff required plaintiff to assume a station on saw sawmill back of what is known as the edger-table, at which table the boards sawn from the saw-logs in said sawmill have their edges or sides trimmed to suit the convenience and requirements of the management of said sawmill, and required plaintiff to remove from and about said edger-table the waste matter resulting from the edging of the said lumber, which said waste matter is known as "edgings"; that said edger-table is a long and wide table on which several boards could be placed at one time and across which said boards were conveyed by rollers to an-

other table in the rear of and beyond the station where plaintiff was directed to work;

That plaintiff was required to stand in a space about two feet wide and three feet long at the rear of said edger-table, and on each side of which station boards from said edger-table were conveyed by rollers to the table beyond and it was plaintiff's duty in such employment and in such position to remove the said waste products or edgings from the edger and deposit them in a conveyor underneath said tables in which they were carried away;

That acting under the direction of said manager, Saltsider, plaintiff then and there commenced to work at said occupation heretofore referred to as "tailing the edger" and continued so to work there until plaintiff was injured as hereafter stated.

IV.

That said work which plaintiff did and which plaintiff was directed to do by the said defendant as aforesaid was dangerous work; that the place where plaintiff was directed to stand in performing said work and labor was not large enough to permit plaintiff or any laborer to stand therein and work and labor with safety to himself; that the work required by defendant of plaintiff as aforesaid was too great for one person to perform and in the attempted performance thereof was fraught with great danger to plaintiff or any person engaged in the operation of such work; that the plaintiff at said time was ignorant of the danger attendant upon the performance of said labor and was ignorant and inexperienced as aforesaid, and did not know or appreciate the danger

incident to the performance thereof, but that the defendant at all of said times and at the time of putting plaintiff to work as aforesaid did know and fully realize that said work was dangerous and that the labor required was too great to be performed by one ordinary man in safety, and did know that the place provided for plaintiff to work was not sufficiently large to enable plaintiff to work with safety to himself; but that said defendant did not, nor did any of its agents or officers give plaintiff any instructions whatever as to the dangers attendant upon such work or inform him of the dangerous place in which he was required to work or of the fact that more work was required of him than could be safely performed by one laborer. That the mill of defendant in which plaintiff was put to work as aforesaid is a very large mill, having a large capacity for the manufacture of lumber, and that it is the custom in mills of such capacity universally to have more than one man employed to do the work required to be done by plaintiff as aforesaid, all of which facts were known to defendant but unknown to plaintiff; that the person who had been employed in the performance of said duty prior to the employment of plaintiff by defendant had quit and refused to work longer at said work, for the reason that the labor thereof was too great for one man to perform and had so notified the defendant, but that plaintiff had no knowledge of said facts and was not notified thereof by defendant.

That plaintiff at the time of said accident was of the age of twenty-six years and had not had ordinary experience and did not at said time have even ordi-

nary knowledge of dangers incident to and connected with the operation of sawmills in general, and of the work as aforesaid in particular, and had not the ability and understanding to know and appreciate the dangers of said position, or even common ordinary dangers incident to and in connection with the operation of sawmill machinery and of machinery in general, and then and there knew no more about such machinery, or any machinery, than a child of the age of fourteen years and of ordinary intelligence.

V.

That on or about June 9, 1907, and after plaintiff had been employed for eight days tailing the edger as aforesaid, and while plaintiff was in the discharge of his duties, as aforesaid, and exercising reasonable care and caution, and without any fault, negligence or carelessness on the part of plaintiff, plaintiff's right leg was caught between a board passing from the edger-table to the table with live rollers beyond the place where plaintiff was standing, and plaintiff was pushed and dragged by means thereof until his leg was fastened and pinioned against the said table beyond said edger-table and pinched and crowded between said table and the said board, and the flesh, muscles, tendons, bones, and blood vessels of plaintiff's said right leg were bruised, wounded, lacerated and mangled in a most shocking and painful manner, and the cords and ligaments of said leg were so cut, bruised and mangled that plaintiff was forced to quit said employment, as aforesaid, and plaintiff went to a hospital and received treatment therein

at the town of Coeur d'Alene and afterwards at other places and was in the care of physicians until finally in December, 1907, after two operations had been performed in a vain attempt to cure said injury, it became necessary to amputate and cut off said leg in order to save plaintiff's life, and in December, 1907, said leg was amputated and removed at a point about two inches above the knee joint; that said amputation of said leg was caused and made necessary by the injury received by plaintiff as aforesaid in the mill of defendant; that at the time of receiving said injury, plaintiff was standing in the place in which he was directed to stand by said manager, Saltsider, in the performance of the duties required of him as aforesaid, and that said leg was caught and injured as aforesaid by reason of the negligence and carelessness of the said defendant in providing a place of insufficient size for plaintiff to stand in the performance of his said labor, and in requiring plaintiff to do more work than should be required of one laborer as aforesaid, and as well as on account of the failure of defendant to warn plaintiff of the danger incident to said place and the performance of said labor, and said board which caught plaintiff's leg as aforesaid was a very wide board and came across said table and projected and filled a large portion of the space provided for plaintiff to stand in and left no remaining room sufficient for plaintiff to stand and perform the labor required of him;

That at said time of receiving said injury, plaintiff, on account of his inexperience at such work and

his general ignorance and inexperience, did not understand or appreciate the danger of said position and of said labor, and was not nor had not at any time been warned thereof by the defendant; that the defendant at all times was aware of said danger as well as of the inexperience and ignorance of the defendant;

That the shock produced by said injury was of a very painful character, and has already shattered plaintiff's entire nervous system and has ruined plaintiff's physical health permanently; that he has suffered and still suffers great pain and has been and is unable to sleep or rest; that his injuries as aforesaid are permanent and lasting; that plaintiff's entire usefulness is hopelessly impaired and destroyed.

That plaintiff has been compelled to pay and has paid hospital fees and surgeon's fees and expenses in connection with the treatment and amputation of said leg in the sum of Four Hundred ($400.00) Dollars;

That at the time of said accident, plaintiff was in sound health, strong and robust and was earning and capable of earning $3.50 *Dollars* per day.

VI.

That by reason of the injury as aforesaid, plaintiff has been damaged in the sum of Twenty Thousand ($20,000.00) Dollars.

Wherefore, plaintiff prays judgment against the defendant for the sum of Twenty Thousand Four

Hundred ($20,400.00) Dollars, and for the costs of this action.

R. T. MORGAN,

Residence and postoffice address: Coeur d'Alene, Idaho,

and

EDWIN McBEE,

Residence and postoffice address: Rathdrum, Idaho,

Attorneys for Plaintiff.

State of Idaho,
County of Kootenai,—ss.

George Goodwin, being first duly sworn, deposes and says:

That he is the plaintiff named in the foregoing complaint; that he has read said complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated to be upon information and belief, and that as to those matters, he believes it to be true.

GEORGE GOODWIN.

Subscribed and sworn to before me, this 18th day of April, A. D. 1908.

[Notarial Seal] MARGARET E. MAIN,

Notary Public.

[Endorsed]: Filed April 20, 1908, at 9 o'clock A. M. T. L. Quarles, Clerk, District Court. By Jas. A. Foster, Deputy.

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Petition for Removal [to U. S. Circuit Court].

PETITION FOR REMOVAL TO THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF IDAHO, NORTHERN DIVISION.

To the Honorable, the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai:

Your petitioner, Coeur d'Alene Lumber Company, a corporation, respectfully shows to this Honorable Court:

That it is the defendant in the above-entitled action, which is of a civil nature, and that the matter and amount in dispute in this cause exceeds the sum or value of Two Thousand Dollars ($2,000), exclusive of interests and costs.

That the above-entitled action was begun in this court by the filing of the complaint herein on the 20th day of April, 1908, and that the summons and complaint herein was served upon the defendant on the 23d day of April, 1908, at Kootenai County, State of Idaho.

That the defendant, Coeur d'Alene Lumber Company, is, and at all of the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

That the controversy herein is between citizens of different States. That the plaintiff, George Goodwin, was, at the time of the commencement of this action, and still is a citizen of the State of Idaho, residing at Coeur d'Alene, Kootenai County, in said State, and that your petitioner, Coeur d'Alene Lumber Company, was, at the time of the commencement of this action and still is a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and a citizen of the State of Washington, and of no other State, and not a resident of the State of Idaho, and that your petitioner desires to remove this action, before the trial thereof, into the Circuit Court of the United States, District of Idaho, Northern Division.

And your petitioner offers herewith good and sufficient bond and surety for its entering in the Circuit Court of the United States, District of Idaho, Northern Division, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by the said Circuit Court of the United States if said Court shall hold that this action was wrongfully and improperly removed thereto.

And your petitioner therefore prays that said surety and bond may be accepted and that this said action may be removed into the Circuit Court of the United States, District of Idaho, Northern Division,

pursuant to the statute of the United States in such case, made and provided, and that no further proceeding may be had herein in this court, and it will ever pray.

[Seal] COEUR D'ALENE LUMBER COMPANY,

By J. T. CARROLL,
Vice-Pres. & Gen. Mgr.

R. E. McFARLAND,
Attorney for Defendant, P. O. Address, Coeur d'Alene, Idaho.

State of Idaho,
County of Kootenai,—ss.

J. T. Carroll, being first duly sworn, deposes and says: That I am the Vice-president and General Manager of Coeur d'Alene Lumber Company, the petitioner in the foregoing petition named, and make this verification for and on behalf of said petitioner; that I have read said petition and know the contents thereof, and that the same is true of my own knowledge, except as to such matters as are therein stated upon information and belief, and as to those matters I believe it to be true.

That this verification is not made by the President or Secretary of said corporation petitioner for the reason that neither the said President nor Secretary of said corporation petitioner is within the State of Idaho.

J. T. CARROLL,

Subscribed and sworn to before me, this 27th day of April, 1908.

[Seal] ROGER G. WEARNE,
Notary Public.

[Endorsed]: Filed April 27, 1908. T. L. Quarles, Clerk of District Court. By Jas. A. Foster, Deputy.

Bond [on Removal to U. S. Circuit Court].

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

BOND.

Know All Men by These Presents, That we, Coeur d'Alene Lumber Company, a corporation, organized and existing under and by virtue of the laws of the State of Washington, as principal, and James H. Harte and Albert V. Chamberlin, as sureties, are held and firmly bound unto George Goodwin, plaintiff in the above-entitled cause, his successors and assigns, in the sum of Five Hundred Dollars ($500), lawful money of the United States of America, for the payment of which, well and truly to be made, we and each of us bind ourselves and each of us, our heirs, successors, executors and administrators,

jointly and severally, firmly, by these presents.

The condition of this obligation is such that whereas said Coeur d'Alene Lumber Company has applied by petition to the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, for the removal of a certain cause, therein pending, wherein George Goodwin, is plaintiff and said Coeur d'Alene Lumber Company, a corporation, is defendant, to the Circuit Court of the United States, District of Idaho, Northern Division, for further proceedings, on grounds in said petition set forth, and that all further proceedings in said action in said District Court be stayed.

Now, therefore, if said petitioner, Coeur d'Alene Lumber Company, a corporation, shall enter in said Circuit Court of the United States, District of Idaho, Northern Division, aforesaid, on or before the first day of the next regular session, a copy of the records in said action, and shall pay or cause to be paid all costs that may be awarded therein by said Circuit Court of the United States, if said Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and effect.

COEUR D'ALENE LUMBER COMPANY.
[Seal]
By J. T. CARROLL,
Vice-Pres. and Gen. Mgr.
JAMES H. HARTE, [Seal]
ALBERT V. CHAMBERLIN. [Seal]

State of Idaho,
County of Kootenai,—ss.

James H. Harte and Albert V. Chamberlin, the sureties whose names are subscribed to the foregoing bond, being first severally duly sworn, each for himself deposes and says:

That he is a resident, householder and freeholder of Kootenai County, State of Idaho, and is worth the sum specified in said bond, over and above his just debts and liabilities, exclusive of property exempt from execution.

JAMES H. HARTE.
ALBERT V. CHAMBERLIN.

Subscribed and sworn to before me, this 27th day of April, 1908.

[Seal] ROGER G. WEARNE,
Notary Public.

Approved this 27th day of April, 1908.

WILLIAM W. WOODS,
Judge of the District Court.

State of Idaho,
County of Kootenai,—ss.

James H. Harte and Albert V. Chamberlin, the sureties whose names are subscribed to the within bond, being first severally duly sworn, each for himself, deposes and says: That he resides within Kootenai County, State of Idaho, and is a householder and freeholder therein and is worth the sum of Five Hun-

dred Dollars ($500), over and above all property exempt from sale on above execution.

JAMES H. HARTE.
ALBERT V. CHAMBERLIN.

Subscribed and sworn to before me, this 27th day of April, 1908.

[Seal] ROGER G. WEARNE,
Notary Public.

This bond approved by me, this 27th day of April, 1908.

WILLIAM W. WOODS,
Judge of the District Court.

[Endorsed]: Filed April 27, 1908. T. L. Quarles, Clerk Dist. Court. By Jas. A. Foster, Deputy.

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

GEORGE GOODWIN,
Plaintiff,
vs.
COEUR D'ALENE LUMBER COMPANY (a Corporation),
Defendant.

Demurrer to Complaint.

Now, comes the above-named defendant and demurs to the complaint of the plaintiff herein and for cause of demurrer alleges:

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore, defendant prays that plaintiff take nothing by his said action and that the same be dismissed with costs to defendant.

R. E. McFARLAND,
Attorney for Defendant.
P. O. Address: Coeur d'Alene, Idaho,

[Endorsed]: Filed April 27, 1908. T. L. Quarles, Clerk Dist. Court. By Jas. A. Foster, Deputy.

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Admission of Service of Demurrer.

Service of the demurrer of the defendant to the complaint of the plaintiff in the above-entitled action, by receipt of a true copy thereof at Coeur d'Alene City, Kootenai County, State of Idaho, this 28th day of April, 1908, is hereby admitted.

R. T. MORGAN and
EDWIN McBEE,
Attorneys for Plaintiff.

[Endorsed]: Filed April 28, 1908. T. L. Quarles, Clerk Dist. Court. By Jas. A. Foster, Deputy.

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Order of Removal [to U. S. Circuit Court].

This cause coming on for hearing upon the application of the defendant herein for an order transferring this cause to the Circuit Court of the United States, District of Idaho, Northern Division, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond, duly conditioned, with good and sufficient sureties, as provided by law, and it appearing to the Court that this is a proper cause for removal to said Circuit Court,—

Now, therefore, it is hereby ordered and adjudged that this cause be, and it is hereby removed to the Circuit Court of the United States, District of Idaho, Northern Division, and the clerk is hereby directed to make up the record in said cause, for transmission to said court forthwith.

Done in open court this 27th day of April, 1908.

WILLIAM W. WOODS,
Judge of the District Court.

[Endorsed]: Filed April 28, 1908. T. L. Quarles, Clerk of Dist. Court. By Jas. A. Foster, Deputy.

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Certificate [to Record on Removal].

State of Idaho,
County of Kootenai,—ss.

I, T. L. Quarles, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the foregoing, consisting of twenty-four pages (exclusive of this certificate), is a true, correct and complete copy of all of the records and files in the above-entitled action, as the same now appears on file and of record in my office.

And I further certify that it is the complete record that I have been directed to transmit to the Circuit Court of the United States, District of Idaho, Northern Division.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at my

office in Rathdrum, Kootenai County, State of Idaho, this 28th day of April, 1908.

[Seal] T. L. QUARLES,
Clerk of the District Court.
By Jas. A. Foster,
Deputy Clerk.

[Endorsed]: Filed May 4, 1908. A. L. Richardson, Clerk. By M. W. Griffith, Deputy.

State of Idaho,
County of Kootenai,—ss.

D. R. Adams, being first duly sworn, deposes and says: That at all of the times herein mentioned he was and is a citizen of the United States of America, a resident of Kootenai County, State of Idaho, over the age of twenty-one years, and was and is the duly appointed, acting and qualified deputy sheriff of Kootenai County, State of Idaho;

That he served the annexed subpoena upon Erick Ostblom at Coeur d'Alene, Kootenai County, State of Idaho, on the 17th day of May, 1909, by then and there leaving with and delivering to said witness a true and correct copy of said subpoena and by exhibiting to him said original subpoena. Said witness did not demand any fees.

D. R. ADAMS.

Subscribed and sworn to before me this 18th day of May, 1909.

[Seal] T. L. QUARLES,
Clerk of the District Court.
By ————,
Deputy Clerk.

[Affidavit of Service of Subpoena.]

State of Idaho,
County of Kootenai,—ss.

Harry Sawyer, being first duly sworn, deposes and says: That at all of the times herein mentioned he was and is a citizen of the United States of America, a resident of Kootenai County, State of Idaho, over the age of twenty-one years, and was and is the duly appointed, acting and qualified deputy sheriff of Kootenai County, State of Idaho;

That he served the annexed subpoena upon the following named witnesses therein mentioned, as follows: Upon Jerry McCarter, at St. Maries, Kootenai County, State of Idaho, on the 13th day of May, 1909, by then and there leaving with and delivering a true and correct copy of said subpoena and exhibiting to him said original subpoena; upon said witnesses H. M. Strathern and Fred Amsbaugh at Coeur d'Alene, Kootenai County, State of Idaho, on the 15th day of May, 1909, by then and there leaving with the *delivering to each of* said last named persons a true and correct copy of said subpoena and by exhibiting the original subpoena to each of them; and upon said witnesses H. Salscheider, H. L. Olson, John T. Smith and Albert Bro, at Coeur d'Alene, Kootenai County, State of Idaho, on the 18th day of May, 1909, by then and there leaving with and delivering to each of said last named persons a true and correct copy of said subpoena and by exhibiting the original subpoena to

each and all of said last named witnesses. Neither of said witnesses demanded any fees.

H. SAWYER.

Subscribed and sworn to before me this 18th day of May, 1909.

[Seal] T. L. QUARLES,
Clerk of the District Court.

In the Circuit Court of the United States, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Notice of Removal [to U. S. Circuit Court].

To George Goodwin, the Above-named Plaintiff, and to R. T. Morgan and Edwin McBee, His Attorneys:

You are hereby notified that, on the 27th day of April, 1908, by an order of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, the above-entitled cause was duly removed from said District Court to the Circuit Court of the United States, for the District of Idaho, Northern Division, and a transcript of the record in said cause, duly certified by the clerk of said District Court, was, on the 29th day of April,

1908, duly transmitted to the clerk of said Circuit Court of the United States for filing.

Dated this 29th day of April, 1908.

R. E. McFARLAND,
Attorney for Defendant,
P. O. Address, Coeur d'Alene, Idaho.

[Affidavit of Service of Notice of Removal to U. S. Circuit Court.]

State of Idaho,
County of Kootenai,—ss.

R. E. McFarland, being first duly sworn, deposes and says: That he is the only attorney of record for the defendant in the above-entitled cause; that he served the annexed and foregoing notice upon the above-named plaintiff, at the city of Coeur d'Alene, Kootenai County, State of Idaho, on the 29th day of April, 1908, by then and there delivering to Ralph T. Morgan, one of the attorneys for said plaintiff, a true and correct copy of said notice.

That at all of said times Edwin McBee, who resides and has his office at the Village of Rathdrum, Kootenai County, State of Idaho, was and yet is one of the attorneys of record of said plaintiff; that at all of said times affiant resided and had his office and still resides and has his office in the city of Coeur d'Alene, Kootenai County, State of Idaho; that in each of said places there was and yet is a United States postoffice, and that between said two places there was and yet is a daily communication by mail;

that affiant also served said notice upon said plaintiff at Coeur d'Alene, Kootenai County, State of Idaho, on the 29th day of April, 1908, by then and there depositing in the United States postoffice at said city of Coeur d'Alene, an envelope, containing a true copy of said notice, addressed to said Edwin McBee, at Rathdrum, Idaho, and affiant prepaid the postage thereon.

R. E. McFARLAND.

Subscribed and sworn to before me this 29th day of April 1908.

[Seal] ALBERT V. CHAMBERLIN,
Notary Public.

[Endorsed]: Filed Apr. 30, 1908. A. L. Richardson, Clerk. By M. W. Griffith, Deputy.

In the Circuit Court of the United States, District of Idaho, Northern Division.

GEORGE GOODWIN,
Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),
Defendant.

Appearance [for the Defendant].

To the Clerk of the Above-entitled Court:

Please enter my appearance as attorney for the defendant in the above-entitled cause.

April 29th, 1908.

R. E. McFARLAND,
Attorney for Defendant,
P. O. Address, Coeur d'Alene, Idaho.

[Endorsed]: Filed May 2, 1908. A. L. Richardson, Clerk. By M. W. Griffith, Deputy.

In the Circuit Court of the United States, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Amended Demurrer to Complaint.

Now comes the above-named defendant and files this its Amended Demurrer to the complaint of plaintiff in the above-entitled action and for cause of demurrer alleges:

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore defendant prays that plaintiff take nothing by his said action and that the same be dismissed with costs to defendant.

R. E. McFARLAND,
Attorney for Defendant,
P. O. Address, Coeur d'Alene, Idaho.

State of Idaho,
County of Kootenai,—ss.

I, R. E. McFarland, do hereby certify that I am the attorney for the defendant in the above-entitled action and that I have read the above and foregoing Demurrer and know the contents thereof, and that, in my opinion, it is well founded in point of law.

Dated this 30th day of April, 1908.

R. E. McFARLAND,
Attorney for Defendant,
P. O. Address, Coeur d'Alene, Idaho.

Service of the foregoing Amended Demurrer, by receipt of a true copy thereof at Kootenai County, State of Idaho, this 30th day of April, is hereby admitted, all rights hereunder reserved.

R. T. MORGAN and
EDWIN McBEE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 2, 1908. A. L. Richardson, Clerk. By M. W. Griffith, Deputy.

In the United States Circuit Court for the Ninth Circuit, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Opinion [on the Amended Demurrer to the Complaint].

R. T. MORGAN, Esq., and EDWIN McBEE, Esq., Attorneys for Plaintiff.

R. E. McFARLAND, Esq., Attorney for Defendant.

DIETRICH, District Judge:

The only objection raised by the demurrer is that the complaint does not state facts sufficient to constitute a cause of action against the defendant. The complaint exhibits a claim for damages for personal injuries received by the plaintiff while he was employed in the defendant's sawmill, it being alleged that the injury resulted from the defendant's negligence in not providing a safe place for the plaintiff to work, and in not warning him of the dangerous character of his employment. Impliedly, it is conceded that a cause of action is stated unless it be held

that the complaint discloses an assumption by the plaintiff of the risk of the injury which he suffered. In an action by a servant against the master to recover damages for personal injury, assumption of risk is an affirmative defense to be pleaded and proved by the defendant, unless the facts constituting such a defense are pleaded by the plaintiff, or are shown by the evidence adduced upon his behalf. It follows that the defendant cannot avail itself of such a defense by interposing a general demurrer to the complaint unless the assumption of risk is fully and unequivocally alleged.

Had a special demurrer been interposed, I would be inclined to require the plaintiff to make his complaint more certain and specific in some particulars, but taking it as it is, its general and somewhat ambiguous allegations do not necessarily imply the existence of all of the conditions which must indisputably appear before the Court would be justified in denying to the plaintiff the right to submit his claim to a jury. The burden not being upon the plaintiff to negative such a defense, ambiguous averments relating thereto must be construed liberally in his favor. The demurrer will be overruled and the defendant will be given thirty days from the date hereof in which further to plead to the complaint.

Dated August 5th, 1908.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Aug. 5, 1908. A. L. Richardson, Clerk.

In the United States Circuit Court for the Ninth Circuit, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Stipulation Extending Time to Answer.

It is hereby agreed and stipulated by and between the plaintiff and the defendant in the above-entitled action that said defendant have sixty (60) days from the first day of August, 1908, in which to serve and file its answer to the complaint of plaintiff in the above-entitled cause, and that plaintiff have twenty (20) days thereafter in which to demur or move against said answer.

Dated this 13th day of August, 1908.

R. T. MORGAN,
EDWIN McBEE,
Attorneys for Plaintiff.
R. E. McFARLAND,
Attorney for Defendant.

It is hereby ordered by me, Judge of the above-entitled Court, that the above stipulation be, and the same is hereby approved and that the time therein stipulated for the service and filing of the answer of

said defendant be, and the same is hereby extended till the 1st day of October, 1908.

Dated this 17th day of August, 1908.

F. S. DIETRICH,
Judge.

[Endorsed]: Filed Aug. 17, 1908. A. L. Richardson, Clerk.

[Order Overruling the Amended Demurrer to the Complaint.]

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Wednesday, the 5th day of August, 1908. Present: Hon. FRANK S. DIETRICH, Judge.

No. 418.

Northern Division.

GEORGE GOODWIN

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation).

On this day was announced the decision of the Court upon the Amended Demurrer to the Complaint herein, heretofore argued and submitted. Ordered that said demurrer be, and the same is hereby overruled, and said defendant is given thirty days from this date in which to further plead to the Complaint herein.

In the United States Circuit Court for the Ninth Circuit, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Answer.

Now, comes the above-named defendant and for answer to the complaint of plaintiff herein, says:

I.

Defendant denies that when it hired and employed plaintiff, in May, 1907, to work for defendant in its sawmill, plaintiff had never done any work in or about a sawmill, or was wholy inexperienced or ignorant in or about such work, or as to the machinery or operation of sawmills, and denies that said plaintiff informed defendant that he had never done any work in or about sawmills, or was wholly inexperienced or ignorant in or about such work, or as to the machinery or operation of sawmills, and denies that, for about one month, immediately after plaintiff had been so employed by defendant, plaintiff was employed by defendant on the log-deck in getting logs out of the water, and to defendant's mill.

II.

Defendant denies that on or about June 1st, 1907, or at any other time, Herman Saltsider was the fore-

man, manager or superintendent of said defendant, or that said Saltsider had full control of the hiring or discharging of the employees of defendant in or about said sawmill, or of the kind, character or place of performance of the work or labor of said employees, or the control, management or custody of the machinery used in or about said sawmill, or the kind or character of work to be done or performed therein, or that he was then and there, or at any time or place acting in said capacity, or as such foreman, manager or superintendent for defendant, or that the said Saltsider requested or directed the plaintiff to change from the place where he had been working, on said log-deck, to work or labor for said defendant in the capacity, known in sawmills or among sawmill laborers as "tailing the edger," and denies that plaintiff was required to stand in a space about two feet wide and three feet long, at the rear of said edger-table, and denies that it was plaintiff's duty, in such employment, or in such position, to remove the said waste products or edgings from the edger, or deposit them in a conveyor underneath said tables, in which they were carried away, and denies that plaintiff acted under said alleged manager, Saltsider, or continued to so work until he was injured, as alleged in said complaint, or at all.

III.

Defendant denies that the said work, or any work which plaintiff did, or which he was directed to do by said defendant, as aforesaid, or at all, was dangerous work, or that the place where the plaintiff was directed to stand in performing said work or labor

was not large enough to permit plaintiff or any laborer to stand therein or work or labor with safety to himself, or that the work required by defendant of plaintiff, as aforesaid, or at all, was too great for one person to perform, or in the attempted performance thereof was fraught with great or other danger to plaintiff, or to any person engaged in the operation of such work, or at all, or that the plaintiff, at said time, or at any time, was ignorant of the dangers attendant upon the performance of said labor, or was ignorant or inexperienced as alleged in said complaint, or at all, or did not know or appreciate the alleged danger incident to the performance thereof, or that the defendant, at all of said times, or at the time of putting plaintiff to work as aforesaid, or at any other time, did know or fully realize that said work was dangerous or that the labor required was too great to be performed by one ordinary man, in safety, or otherwise, or did know that the place provided for plaintiff to work was not sufficiently large to enable plaintiff to work with safety to himself, or that said defendant, or its agents, or officers did not give plaintiff any instructions whatever as to the dangers attendant upon such work, or inform him of the dangerous place in which he was required to work, or of the fact that more work was required of him than could be safely performed by one laborer, and defendant denies that it is the custom in mills of such capacity as defendant's mills, universally or at all, to have more than one man employed to do the work required to be done by plaintiff, as alleged in said complaint, or at all, or that said defendant knew that

it was the custom in mills of such capacity universally or otherwise, to have more than one man employed to do the work required to be done by plaintiff, as alleged in said complaint, or that the person who had been employed in the performance of said duty, prior to the employment of plaintiff by defendant, had quit or refused to work longer at said work for the reason that the labor thereof was too great for one man to perform, or that such person had so notified the defendant that the said labor was too great for one man to perform, or that plaintiff had no knowledge of said facts, and defendant denies that plaintiff had not had ordinary experience, or did not, at said time, or at any other time, have even ordinary knowledge of the dangers incident to, or connected with the operation of sawmills in general, or at all, or of the said alleged work in particular, or had not the ability or understanding to know or appreciate the dangers of said position or common ordinary dangers incident to or in connection with the operation of sawmill machinery, or of machinery in general, or then and there knew no more about such machinery, or any machinery, than a child of the age of fourteen years or of ordinary intelligence.

IV.

Defendant denies that on or about June 9, 1907, or at any other time, after plaintiff had been employed for eight days tailing the edger, or at all, or while plaintiff was in the discharge of his duties, as alleged in said complaint, or at all, or exercising reasonable care or caution, or without any fault, negligence or carelessness on the part of plaintiff, plain-

tiff's right leg was caught between a board passing from the edger-table to the table with live rollers, beyond the place where plaintiff was standing, or at all, or that plaintiff was pushed or dragged by means thereof until his leg was fastened or pinioned against said table beyond said edger-table, or at all, or was pinched or crowded between said table and the said board, or the flesh, muscles, tendons, bones or blood vessels of plaintiff's right leg were bruised, wounded, lacerated or mangled in a most shocking or painful manner, or in any other manner, or at all, or that the cords or ligaments of said leg were so cut, bruised or mangled that plaintiff was forced to quit said employment, or at all, or that plaintiff went to a hospital or received treatment therein, at the town of Coeur d'Alene, or at all, or afterwards, at other places, or in the care of physicians, until finally in December, 1907, or at any other time, after two operations had been performed in a vain or other attempt to cure said injury, it became necessary to amputate or cut off said leg in order to save plaintiff's life, or at all, or in December, 1907, said leg was amputated or removed, at a point two inches above the knee joint, or at all, and denies that said amputation of said leg was caused or made necessary by the alleged injury received by plaintiff in the mill of defendant, or at all, and denies that plaintiff's said leg was ever injured in the mill of defendant, and denies that, at the time of receiving said injury, plaintiff was standing in the place in which he was directed to stand by said alleged manager, Saltsider, in the performance of the duties required of him, or

that said leg was cut or injured by reason of the negligence or carelessness of said defendant in providing a place of insufficient size for plaintiff to stand in the performance of his said labor, or in requiring plaintiff to do more work than should be required of one laborer or as well as on account of the failure of defendant to warn plaintiff of the danger incident to said place or the performance of said labor, or that the board which plaintiff alleges caught plaintiff's leg, as aforesaid, was a very wide board, or came across said table or projected or filled a large portion of the space provided for plaintiff to stand in, or left no remaining room sufficient for plaintiff to stand or perform the labor required of him, and defendant denies, that, at the time alleged in the complaint, or at any other time, or that at the time plaintiff, alleged to have received said injury, plaintiff, on account of his inexperience at such work, or his general ignorance or inexperience, did not understand or appreciate the danger of said position or of said labor, or was not or had not, at any time, been warned thereof by the defendant, or that the defendant, at all times, or any time, was aware of said danger as well as of the inexperience or ignorance of the defendant, or that the defendant was aware of the inexperience or ignorance of the defendant, and defendant denies that the shock or any shock produced by said alleged injury was of a very painful or other character, or has already shattered plaintiff's entire nervous system or has ruined plaintiff's physical health permanently, or otherwise, or at all, or that plaintiff has suffered or still suffers great

pain, or has been or now is unable to sleep or rest, or that his said alleged injuries are permanent or lasting or of any other character at all, or that plaintiff's entire usefulness is hopelessly impaired or destroyed.

V.

Defendant denies that plaintiff, while in its employ, or at all, received any injuries through the carelessness or negligence of defendant or by or through the fact that plaintiff was required to perform more work than one man could safely perform, or was not given a sufficient space in which to stand while performing such work, or at all, and denies that plaintiff's said leg was bruised, wounded, mangled or otherwise injured while in the employ of defendant.

VI.

Defendant denies that plaintiff has been compelled to pay, or has paid hospital or surgeon's fees or expenses in connection with the treatment or amputation of his leg, in the sum of Four Hundred Dollars ($400), or any other sum, on account of any injury received by him while in defendant's employ, and denies that by reason of the alleged injury of plaintiff, plaintiff has been damaged in the sum of Twenty Thousand Dollars ($20,000) or any other sum, and denies that by reason of any injury which plaintiff received while in the employ of said defendant, he has been damaged in the sum of Twenty Thousand Dollars ($20,000) or any other sum whatever, or at all.

And for another, further, separate and affirmative answer and defense herein, defendant alleges:

I.

That at all of the times mentioned in the complaint herein, defendant was and yet is a corporation duly organized and existing under and by virtue of the laws of the State of Washington and authorized to do business in the State of Idaho, and was engaged in the business and occupation of manufacturing and selling lumber, with its principal place of business at the City of Coeur d'Alene, Kootenai County, State of Idaho, and had, in writing, accepted the provisions of the Constitution of the State of Idaho, and had filed a certified copy of its Articles of Incorporation, duly certified by the Secretary of the State of Washington, with the County Recorder of Kootenai County, State of Idaho, and had caused to be filed with the Secretary of the State of Idaho, a copy of said certified copy of said Articles of Incorporation, duly certified by the said Recorder of Kootenai County, and had filed in the office of the Secretary of the State of Idaho, in the office of the County Recorder of said Kootenai County, and in the office of the clerk of the District Court of the First Judicial District of the State of Idaho, the written designation of Coeur d'Alene as the principal place of business of said corporation, and the designation of a person upon whom process, issued against said corporation under the laws of the State of Idaho, may be served, and that at all of said times, defendant had complied with all of the provisions of the Constitution and Laws of the State of Idaho with ref-

erence to foreign or nonresident corporations doing business in the State of Idaho.

II.

That, if said plaintiff was injured as set forth in his complaint herein, or at all, or if the accident to the plaintiff occurred as alleged in said complaint, or at all, the conditions surrounding the same, and everything in connection therewith, were well known to the plaintiff at and before the time of said accident, and that all danger or hazard in connection therewith was, at all times, known to said plaintiff, and, in accepting said employment and in performing said work, which he is alleged to have been performing at the time of said accident, he assumed all risks and hazards in connection therewith, and part of the consideration of his employment by the defendant, to do the work which he was performing at the time of said accident, was, that he, the said plaintiff, should assume entirely all risk or risks incident thereto or connected therewith, and holding the defendant harmless in the event of any injury such as is complained of in the plaintiff's complaint.

Wherefore, this defendant prays that the plaintiff take nothing herein; that this action be dismissed, and that it have its costs and disbursements herein incurred.

R. E. McFARLAND,
Attorney for Defendant.
P. O. Address: Coeur d'Alene, Ida.

State of Idaho,
County of Kootenai,—ss.

J. T. Carroll, being first duly sworn, deposes and says: That he is General Manager and Vice-president of the above-named corporation defendant, and that he makes this verification for and on behalf of said corporation defendant; that there is no other officer, agent or manager of said corporation defendant in the State of Idaho to make said verification; that affiant has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes the same to be true.

J. T. CARROLL.

Subscribed and sworn to before me, this 21st day of September, 1908.

V. W. PLATT,
Notary Public.

Service of the foregoing Answer, by receipt of a true copy thereof, this 21st day of September, 1908, at Kootenai County, State of Idaho, is hereby admitted.

R. T. MORGAN,
EDWIN McBEE,
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 23, 1908. A. L. Richardson, Clerk. By M. W. Griffith, Deputy.

[Stipulation Postponing the Trial.]

In the United States Circuit Court for the Ninth Circuit, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

STIPULATION POSTPONING CASE.

It is hereby agreed and stipulated by and between the plaintiff and the defendant in the above-entitled action that the trial of said action be postponed and continued till the next regular spring term of the above-entitled court.

Dated this 7th day of November, 1908.

R. T. MORGAN,
EDWIN McBEE,
Attorneys for Plaintiff.
R. E. McFARLAND,
Attorney for Defendant.

Good and sufficient reason appearing therefor, it is hereby ordered that the above and foregoing stipulation be, and the same is hereby approved and allowed, and the trial of said cause is hereby ordered postponed and continued as in said stipulation specified.

Dated this —— day of November, 1908.

_____,
Judge.

[Endorsed]: Filed Nov. 11, 1908. A. L. Richardson, Clerk. By M. W. Griffith, Deputy.

In the Circuit Court of the United States, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Stipulation [that the Defendant Corporation has Complied with the Constitution, etc.].

It is hereby agreed and stipulated by and between plaintiff and defendant in the above-entitled action:

That at all of the times mentioned in the complaint and answer herein the defendant had complied with the Constitution and all of the laws of the State of Idaho in respect to the nonresident and foreign incorporations doing business in said State and was authorized to do business in the State of Idaho and had filed certified copies of its articles of incorporation, and had designated an agent upon whom process issued out of the courts of said State may

be served as required by the statutes of the State of Idaho.

Dated this 20th day of May, 1909.

R. T. MORGAN,
EDWIN McBEE,
Attorneys for Plaintiff.
R. E. McFARLAND,
Attorney for Defendant.

[Endorsed]: Filed May 22, 1909. A. L. Richardson, Clerk.

[Instruction for a Verdict Requested by the Defendant.]

In the Circuit Court of the United States of the District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

INSTRUCTIONS REQUESTED BY DEFENDANT.

Comes now the defendant by its attorney of record and requests the Court to give the following instructions:

Gentlemen of the jury, you are instructed to return a verdict in this case in favor of the defendant.

[Endorsed]: Filed May 22, 1909. A. L. Richardson, Clerk.

[Order Fixing Time to Prepare Bill of Exceptions, etc.]

In the Circuit Court of the United States for the District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

ORDER EXTENDING TIME TO PROPOSE AND SERVE BILL OF EXCEPTIONS AND AFFIDAVITS ON MOTION FOR NEW TRIAL.

The plaintiff consenting thereto, and good and sufficient reasons appearing therefor, upon the motion of R. E. McFarland, the attorney for the defendant in the above-entitled action, it is hereby ordered that said defendant have sixty (60) days from the date hereof, in which to prepare, propose, serve and present, its bill of exceptions, containing all of the exceptions and proceedings taken in, and upon the trial of the said cause, and also in which to file and serve affidavits on motion for new trial therein.

Said bill of exceptions to contain all of the testimony, rulings, exceptions and proceedings had during the trial of the above-entitled action, and may be used upon motion for a new trial herein, and upon

an appeal in the event that such new trial is denied.

Dated this 22d day of May, A. D. 1909.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed May 22, 1909. A. L. Richardson, Clerk.

[Further Notice of Intention to Move for a New Trial.]

In the United States Circuit Court for the Ninth Circuit, District of Idaho, Northern Division.

GEORGE GOODWIN,
Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),
Defendant.

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL.

To the Above-named Plaintiff, and to Edwin McBee and R. T. Morgan, Attorneys for Plaintiff:

You and each of you will please take notice that, in addition to the notice given by defendant in open court at Moscow, Idaho, on the 24th day of May, 1909, of its intention to move for a new trial herein, and without waiving said notice, now comes the above-named defendant and further gives notice of its intention to move for a new trial in said action for the following causes materially affecting the substantial rights of defendant.

I.

Irregularity in the proceedings of the Court, by which the defendant was prevented from having a fair trial.

II.

Irregularity in the proceedings of the adverse party, by which defendant was prevented from having a fair trial.

III.

Surprise which ordinary prudence could not have guarded against.

IV.

Newly discovered evidence material for the defendant, which it could not with reasonable diligence have discovered and produced at the trial.

V.

Excessive damages appearing to have been given under influence of passion or prejudice.

VI.

Insufficiency of the evidence to justify the verdict.

VII.

That the verdict is against law.

VIII.

Error in law occurring at the trial and excepted to by the defendant.

Said motion for a new trial will be made and based upon affidavits so far as the question of newly-discovered evidence is concerned, and upon the pleadings, papers, files and minutes of the Court and Clerk, as well as upon the reporter's transcript of his shorthand notes, and upon any and all bills of exceptions which may have been served and filed at

the time of hearing of said motion as to all of the other causes or grounds for a new trial.

R. E. McFARLAND,
Attorney for Defendant,
P. O. Address Coeur d'Alene, Idaho.

Service of the foregoing Notice, by receipt of a true copy at Coeur d'Alene, Kootenai County, State of Idaho, this 28th day of May, 1909, is hereby admitted.

R. T. MORGAN,
EDWIN McBEE,
Attorneys for Plaintiff,
P. O. Address, Coeur d'Alene, Idaho.

[Endorsed]: Filed May 30, 1909. A. L. Richardson, Clerk.

[Stipulation Concerning the Taxation of Costs.]

In the Circuit Court of the United States, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

It is hereby stipulated and agreed by and between the plaintiff and the defendant in the above-entitled action, by and through their respective counsel, that, in taxing plaintiff's costs in said action, there be al-

lowed to him, exclusive of the costs and fees of the clerk of the above-named court, the sum of One Hundred Four and 5/100 Dollars, which includes service of subpoenas, witnesses' fees, and mileage, and that in taxing said costs, the clerk of this court be and he is hereby authorized to add thereto the amount of his costs and fees, incurred by plaintiff, and place the result or sum total in the judgment herein, as plaintiff's costs recovered against the defendant in the above-entitled action.

Dated and signed this the 27th day of May, 1909.

R. T. MORGAN,
EDWIN McBEE,
Attorneys for Plaintiff.
R. E. McFARLAND,
Attorney for Defendant.

	$104.05
Clerk's fees,	10.10
	$114.15

[Endorsed]: Filed May 31, 1909. A. L. Richardson, Clerk.

United States Circuit Court, Northern Division, District of Idaho.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess the damages at the sum of $3,000.

ARCHIE O. MARTIN,
Foreman.

[Endorsed]: Filed May 22, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Northern Division.

GEORGE GOODWIN,
Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),
Defendant.

Judgment.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict and subsequently returned into court, and, being called, answered to their names, and say they find a verdict for the plaintiff, in the sum of $3,000.00.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged, that said plaintiff have and recover from said defendant the sum of $3,000.00, with interest thereon at the rate of seven per cent per annum, from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $114.15.

Judgment rendered May 22d, 1909.

United States of America,
District of Idaho,—ss.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify that the above and foregoing is a true and correct copy of the Judgment in said cause entered in Judgment Book 2 of said Court, at page 192.

Witness my hand and the seal of said court this 22d day of May, 1909.

[Seal] A. L. RICHARDSON,
Clerk.

In the United States Circuit Court for the Ninth Circuit, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Stipulation and Order Extending Time to File Defendant's Bill [of Exceptions].

It is hereby stipulated and agreed, by and between the plaintiff and the defendant in the above-entitled action, that, in addition to the time heretofore granted defendant, by an order of the above-entitled court, in which to prepare, propose and serve its bill of exceptions containing all of the proceedings had during the trial of this action, the defendant have thirty (30) days in which to prepare, propose and serve its said bill of exceptions herein, and that plaintiff have 30 days thereafter in which to prepare, propose and serve amendments to said bill of exceptions.

Dated this 23d day of June, 1909.

EDWIN McBEE,
R. T. MORGAN,
Attorneys for Plaintiff.
R. E. McFARLAND,
Attorney for Defendant.

Upon reading the filing the foregoing stipulation, and good and sufficient reasons appearing therefor, upon motion of R. E. McFarland, the attorney for the defendant in the above-entitled action, it is hereby ordered that said stipulation be and the same is hereby approved, and that, in addition to the time heretofore granted the defendant in which to prepare, propose and serve its bill of exceptions containing all the proceedings had during the trial of the above-entitled action, thirty (30) days further time be, and the same is hereby granted said defend-

ant in which to prepare, propose and serve said bill of exceptions.

Dated this 6th day of July, 1909.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 6, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court for the Ninth Circuit, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Stipulation Postponing Time of Hearing Petition for a New Trial.

It is hereby agreed and stipulated, by and between the plaintiff and the defendant in the above-entitled action, by and through their respective attorneys, as follows:

I.

That the hearing of the petition of defendant for a new trial herein be, and the same is continued over the October term of the above-entitled court, and to such time and place as may be hereafter agreed upon by the parties hereto.

II.

That, if the parties fail to agree upon the time and place of the hearing of said petition, then the time and place of such hearing may be fixed by either party upon fifteen (15) days' notice, in writing, thereof, being served upon the adverse party.

III.

That all the other stipulations and agreements contained in the stipulation heretofore filed herein, and made and dated on the 25th day of June, A. D. 1909, by and between said parties, as to the hearing of said petition for a new trial, be and the same are hereby continued in full force and effect.

Dated this 16th day of October, A. D. 1909.

R. T. MORGAN,
EDWIN McBEE,
Attorneys for Plaintiff.

R. E. McFARLAND,
Attorney for Defendant.

Good and sufficient reasons appearing therefor, it is hereby ordered that the above and foregoing stipulation, and all of the conditions and provisions thereof, be and the same is hereby approved, and the hearing of the petition for a new trial herein be, and the same is hereby postponed according to the terms and conditions of said stipulation.

Dated this 18th day of October, A. D. 1909.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed, Oct. 18, 1909. A. L. Richardson, Clerk.

Defendant's Bill of Exceptions.

In the United States Circuit Court for the Ninth Circuit, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

[Proceedings had May 20, 1909.]

Be it remembered that heretofore, to wit, on the 20th day of May, A. D. 1909, being one of the days of the May term of the United States Circuit Court for the Ninth Judicial Circuit, District of Idaho, Northern Division, before the Honorable Frank S. Dietrich, Judge of said court presiding, and a jury, this cause came on for trial on the pleadings heretofore filed herein, Messrs. Edwin McBee and Ralph T. Morgan appearing as attorneys for plaintiff, and R. E. McFarland appearing as attorney for defendant. And thereupon the following evidence and exhibits were introduced and the following proceedings had, to wit:

Stipulation.

If your Honor please, counsel upon both sides have agreed to stipulate in open court, and do hereby stipulate, that either party may have sixty days from the date of the rendition of the judgment herein in

which to prepare and serve a bill of exceptions containing all of the testimony and proceedings had in this cause and all of the exceptions taken to the rulings of the Court, and in which to prepare, serve and file affidavits on motion for a new trial.

The COURT.—Very well, it is so ordered.

Order Excluding Witnesses From Courtroom.

Mr. McFARLAND.—If your Honor please, before counsel makes his opening statement, I desire to ask your Honor to enforce the rule with reference to the exclusion of witnesses at this time; I would ask that that be done.

The COURT.—Very well; all the witnesses in this case will be excluded from the courtroom during the trial. You, however, should remain out here in the hall, and not make any more noise than necessary. The building is very noisy. I don't know that you will need your witnesses here during the afternoon, will you, Mr. McFarland?

Mr. McFARLAND.—I think not, your Honor. I would like to have Mr. Salscheider, who is the only representative of the defendant here, remain in the room with me; he takes the place of the defendant.

The COURT.—Very well. Just a moment, gentlemen; how many witnesses have you?

Mr. McFARLAND.—All the witnesses for the defendant stand up.

Mr. McBEE.—We have here, besides the plaintiff, three witnesses. I think that we will finish with all the witnesses we have here this afternoon.

The COURT.—All of the witnesses for the plaintiff should remain in the hallway. The jurors who

are not upon this jury may be excused until to-morrow morning at ten o'clock; they may remain in the courtroom if they desire—that is, the jurors. This is optional with them, but you will not be required to be here until to-morrow morning at ten o'clock.

Opening Statement on Behalf of Plaintiff.

Mr. McBEE.—If the Court please, and gentlemen of the jury, this is an action brought by George Goodwin against the Coeur d'Alene Lumber Company. The complaint is not very long, and I will read it in order that you may be advised as to the issues.

Omitting the title of the court and the cause, it was brought in the District Court of Kootenai County, Idaho, and transferred to this court. Paragraph one alleges that the defendant is a corporation.

Paragraph two: That in May, 1907, the defendant hired and employed the plaintiff to work for the defendant in its said sawmill; then when the defendant so hired and employed plaintiff, the plaintiff had never done any work in or about a sawmill, and was wholly inexperienced and ignorant in and about such work and as to the machinery and operation of the sawmills, and so informed the defendant; that for about one month immediately after plaintiff had been so employed by defendant, plaintiff was employed by defendant on the log deck in getting logs out of the water and to defendant's mill.

Paragraph three: That about June 1, 1907, Herman Salscheider, who then and there was the foreman, manager or superintendent of said defendant, having full control of the hiring and discharging of the employees of the defendant in and about said mill,

and of the kind, character and place of performance of the work and labor of said employees, and the control, management, and custody of the machinery used in and about said mill, and the kind and character of work to be done and performed therein, then and there acting in said capacity and as such foreman, manager and superintendent for defendant, requested and directed the plaintiff to change from the place where he had been working as aforesaid on said log deck, and to work and labor for the said defendant in the capacity known in sawmills and among sawmill laborers as tailing the edger; that the duties of said labor so requested by said defendant to be performed by plaintiff required plaintiff to assume a station on said sawmill back of what is known as the edger-table, at which table the boards sawn from the saw-logs in said sawmill have their edges or sides trimmed to suit the convenience and requirements of the management of said sawmill, and required plaintiff to remove from and about said edger-table the waste matter resulting from the edging of the said lumber, which said waste matter is known as edgings; that said edger-table is a long and wide table on which several boards could be placed at one time, and across which said boards were conveyed by rollers to another table in the rear of and beyond the station where plaintiff was directed to work; that plaintiff was required to stand in a space about two feet wide and three feet long at the rear of said edger-table, and on each side of which station boards from said edger-table were conveyed by rollers to the table beyond, and it was plaintiff's duty in such em-

ployment and in such position to remove the said waste products or edgings from the edger and deposit them in a conveyor underneath said tables in which they were carried away; that acting under the direction of said manager, Salscheider, plaintiff, then and there commenced to work at said occupation heretofore referred to as tailing the edger, and continued so to work there until plaintiff was injured as hereafter stated.

Four: That said work which plaintiff did, and which plaintiff was directed to do by the said defendant, as aforesaid, was dangerous work; that the place where plaintiff was directed to stand in performing said work and labor was not large enough to permit plaintiff or any laborer to stand therein and work and labor with safety to himself; that the work required by defendant of plaintiff as aforesaid was too great for one person to perform, and in the attempted performance thereof was fraught with great danger to plaintiff or any person engaged in the operation of such work; that the plaintiff at said time was ignorant of the danger attendant upon the performance of said labor, and was ignorant and inexperienced as aforesaid and did not know or appreciate the danger incident to the performance thereof, but that the defendant, at all of said times, and at the time of putting plaintiff to work, as aforesaid, did know and fully realize the said work was dangerous and that the labor required was too great to be performed by one ordinary man, in safety, and did know that the place provided for plaintiff to work was not sufficiently large to enable plaintiff to work

with safety to himself; but that said defendant did not, nor did any of its agents or officers give plaintiff any instructions whatever as to the dangers attendant upon such work, or inform him of the dangerous place in which he was required to work, or of the fact that more work was required of him than could be safely performed by one laborer; that the mill of defendant in which plaintiff was put to work as aforesaid is a very large mill, having a large capacity for the manufacture of lumber, and that it is the custom in mills of such capacity universally to have more than one man employed to do the work required to be done by plaintiff as aforesaid, all of which facts were known to defendant but unknown to plaintiff; that the person who had been employed in the performance of said duty prior to the employment of plaintiff by defendant had quit and refused to work longer at said work for the reason that the labor thereof was too great for one man to perform and had so notified the defendant, but that plaintiff had no knowledge of said facts and was not notified thereof by defendant; that plaintiff, at the time of said accident, was at the age of twenty-six years and had not had ordinary experience and did not at said time have even ordinary knowledge of dangers incident to and connected with the operation of sawmills in general, and of the work as aforesaid in particular, and had not the ability and understanding to know and appreciate the dangers of said position, or even common ordinary dangers incident to, and in connection with, the operation of sawmill machinery and of machinery in general, and then and there

knew no more about such machinery, or any machinery, than a child of the age of fourteen years, and of ordinary intelligence.

Five: That on or about June 9, 1907, and after plaintiff had been employed for eight days tailing the edger, as aforesaid, and while plaintiff was in the discharge of his duties, as aforesaid, and exercising reasonable care and caution, and without any fault, negligence, or carelessness on the part of plaintiff, plaintiff's right leg was caught between a board passing from the edger-table to the table with live rollers beyond the place where plaintiff was standing, and plaintiff was pushed and dragged by means thereof until his leg was fastened and pinioned against the said table, beyond said edger-table, and pinched and crowded between said table and said board, and the flesh, muscles, tendons, bones and blood vessels of plaintiff's said right leg were bruised, wounded, lacerated, and mangled in a most shocking and painful manner, and the cords and ligaments of said leg were so cut, bruised, and mangled that plaintiff was forced to quit said employment, as aforesaid, and plaintiff went to a hospital and received treatment therein at the town of Coeur d'Alene, and afterwards at other places, and was in the care of physicians until finally, in December, 1907, after two operations had been performed in a vain attempt to cure said injury, it became necessary to amputate and cut off said leg in order to save plaintiff's life, and in December, 1907, said leg was amputated and removed at a point about two inches above the knee joint; that said amputation of said

leg was caused and made necessary by the injury received by plaintiff, as aforesaid, in the mill of defendant; that at the time of receiving said injury plaintiff was standing in the place in which he was directed to stand by said manager, Salscheider, in the performance of the duties required of him as aforesaid, and that said leg was caught and injured as aforesaid by reason of the negligence and carelessness of the said defendant in providing a place of insufficient size for plaintiff to stand in the performance of his said labor, and in requiring plaintiff to do more work than should be required of one laborer, as aforesaid, and as well as on account of the failure of defendant to warn plaintiff of the danger incident to said place, and the performance of said labor; and said board which caught plaintiff's leg, as aforesaid, was a very wide board, and came across said table and projected and filled a large portion of the space provided for plaintiff to stand in, and left no remaining room sufficient for plaintiff to stand and perform the labor required of him; that at said time of receiving said injury, plaintiff, on account of his inexperience at such work, and his general ignorance and inexperience, did not understand or appreciate the danger of said position and of said labor, and was not, nor had not, at any time been warned thereof by the defendant; that the defendant at all times was aware of said danger, as well as of the inexperience and ignorance of the defendant; that the shock produced by said injury was of a very painful character, and has already shattered plaintiff's entire nervous system, and has

ruined plaintiff's physical health permanently; that he has suffered, and still suffers, great pain, and has been and is unable to sleep or rest; that his injuries, as aforesaid, are permanent and lasting; that plaintiff's entire usefulness is hopelessly impaired and destroyed;

That plaintiff has been compelled to pay, and has paid, hospital fees and surgeon's fees and expenses, in connection with the treatment and amputation of said leg in the sum of four hundred dollars;

That at the time of said accident plaintiff was in sound health, strong and robust, and was earning, and capable of earning, $3.50 per day.

That by reason of the injury, as aforesaid, plaintiff has been damaged in the sum of twenty thousand dollars.

Wherefore, plaintiff prays judgment against the defendant for the sum of twenty thousand four hundred dollars, and for the costs of this action."

The defendant has filed an answer, denying practically all of the allegations of the complaint, except that it is a corporation; it denies that Mr. Salscheider is the foreman, or was at that time the foreman of the company authorized to employ men; it denies any injury; and I believe alleges and contends that the injury which caused the amputation of the leg of George Goodwin was not inflicted in defendant's mill, or at that time at all. We expect to prove the facts set forth in the complaint; to prove that the plaintiff was an inexperienced man in sawmill work; that he had had no experience in this kind of work, and told the defendant so at the time he was put to

this work; that he worked there the period of eight days, as alleged in the complaint; that he was caught by this board, and crushed between the board and the table beyond, and mashed and bruised, as we have alleged; that he suffered the injuries described in the complaint; and that, after being treated in vain attempts to cure the leg, amputation was necessary. We expect to prove that this was a dangerous place to work; that the pit in which he stood was a pit something like two or three feet deep, and that it was too small; that this pit is about sixteen feet beyond the edger saw; that the board, in coming through the saw, is held rigid by the rollers which hold it for the saw, and as it slides along on the table it is propelled by the machinery which is propelling these rollers, and nothing can stop it, so that when it pressed against his leg, it pressed with powerful force.

That at that time he was busily engaged in taking away these edgings, which were coming with great rapidity and in large quantities, and his leg was caught and bruised and mangled as we have described, before he could extricate himself from it. We expect to show these facts by the testimony of the plaintiff himself, and by the testimony of another witness, who saw the circumstance, and who knows the condition of things; we expect to show this by those who were his companions, who were with him daily thereafter, that he continuously suffered from this injury, and that his leg was finally amputated, and that his health is now so shattered—of course, since his leg has been amputated he has no capacity for physical labor—and that he has not

the intellectual ability to engage in other pursuits, and that there is no occupation which he can follow; and that if there were manual labor that he could do or could obtain, he has not the physical strength to perform it—he is a physical wreck. He is a man without education, who could not engage or quality himself for other pursuits; he is a man whose mind is as simple as that of a child, as we say in our complaint, a child of fourteen years.

If we prove all of this, and I hope we will, I hope we can, we will ask of you a verdict in this case for such sum as you think will compensate him for the injury. We have laid our damage at $20,000, in addition to the expenses incurred in medical treatment.

The COURT.—Do you desire to make a statement now?

Mr. McFARLAND.—No, your Honor.

The COURT.—Call your first witness.

Mr. McBEE.—Mr. Goodwin may be sworn.

[Testimony of George Goodwin, the Plaintiff, in His Own Behalf.]

GEORGE GOODWIN, the plaintiff, was called, sworn and testified in his own behalf, as follows:

Direct Examination.

(By Mr. McBEE.)

Q. You may state your name.

A. George Goodwin.

Q. How old are you, George?

A. About twenty-eight years old.

Q. Where were you born?

Mr. McFARLAND.—If the Court please, at this time I desire to interpose an objection to the admis-

sion of any testimony in the case, on the ground and for the reason that the complaint does not state facts sufficient to constitute a cause of action.

The COURT.—Overruled.

To which ruling of the Court the defendant then and there duly excepted.

Mr. McBEE.—Q. Where were you born?

A. I was born in Ireland.

Q. How long did you live there?

A. I came to this country in 1904.

Q. What occupation, if any, did you follow in Ireland? A. Farming.

Q. In what capacity?

A. On a small scale.

Q. As hired man, or for yourself?

A. I farmed a little for myself, and more as hired man.

Q. When you first came to America, where did you first come to? A. I landed in New York.

Q. Where did you first obtain employment?

A. In Washburn, Wisconsin.

Q. What did you do there?

A. I went to work in a coal dock, shoveling coal.

Q. Where did you go from there?

A. Well, I went to the woods in the winter time.

Q. What did you do in the woods?

A. I was doing what they call swamping saw-logs, cutting roads to get saw-logs out, cutting brush.

Q. Where did you go next from there?

A. I came back to town in the spring, to Washburn again next spring.

(Testimony of George Goodwin.)

Q. From there where did you go?

A. I went to work in the coal dock again.

Q. When you left Washburn where did you go?

A. I went to the coast.

Q. How long did you stay on the coast?

A. I was there about two months, I guess.

Q. Where did you go then?

A. I came to Coeur d'Alene.

Q. Coeur d'Alene, Kootenai County, Idaho?

A. Yes.

Q. What did you do there?

A. I went to work there shoveling for a contractor, shoveling dirt.

Q. How long did you work at that?

A. About a week.

Q. Where did you next obtain employment?

A. I obtained employment in a hoist in the same city.

Q. Who for?

A. McGoldrick Lumber Company, Spokane, Washington.

Q. Where did you next work?

A. Went to work in the Coeur d'Alene Lumber Company's sawmill.

Q. Who employed you?

A. Herman Salscheider.

Q. This man here (pointing)? A. Yes, sir.

Q. What was his capacity at that time?

Mr. McFARLAND.—I object, unless he knows.

Mr. McBEE.—Q. Do you know what his business was at that time?

(Testimony of George Goodwin.)

A. He was foreman of the sawmill.

Q. Was he the man who employed you?

A. Yes, sir.

Q. What did he employ you to do?

A. He put me to work rolling logs.

Q. State what your work was at that time?

A. I was rolling logs off of the log deck that goes to be cut in boards.

Q. These logs were in the water?

A. They were hauled out of the water by one man, and he sent them on to me where I worked, and I rolled them out with a cant hook, rolled them onto the deck that took them to the carriage.

Q. How long did you work at that?

A. I worked about two weeks at that.

Q. What did you do next?

A. He put me on the other deck then, pulling the logs out of the water.

Q. Who put you on the other work?

A. Herman Salscheider, the foreman.

Q. How long did you work at that?

A. About a week.

Q. Did you then make another change in your work?

A. He put me then where I got hurt, back of the edger.

Q. Who put you there?

A. Herman Salscheider.

Q. During this time had you received any pay for your work? A. I got one pay.

Q. You were paid by the company?

(Testimony of George Goodwin.)

A. Yes.

Q. According to the terms of your contract with Mr. Salscheider? A. Yes.

Q. He fixed the wages, did he? A. Yes.

Mr. McFARLAND.—I suggest, Mr. McBee, that you do not lead your witness.

Mr. McBEE.—I just wanted to show that Mr. Salscheider was foreman and had a right to employ men; you have denied it.

Q. You say that he next put you to work in the place where you got hurt? A. Yes.

Q. Did you have any conversation with Mr. Salscheider at any of those times before you went to work at the place you got hurt in which anything was said about your experience in sawmill work?

A. I told him I never worked in a sawmill.

Q. When did you tell him that?

A. When I went to work there.

Q. When you first went to work on the log deck?

A. Yes.

Q. Had you ever worked in a sawmill before that? A. No, sir.

Q. Did you have any other conversation with him about it at the time you went to work tailing the edger?

A. I told him I didn't know nothing about it; I didn't want to take the job, and he told me that there was $2.50 pay in that job, tailing the edger, and he told me he would give me $2.75 if I done it.

Q. That was an increase over what you had been getting?

(Testimony of George Goodwin.)

A. That was an increase over what the man that was doing it was getting.

Q. Had you seen anybody working on this job, tailing the edger, before you went to work there?

A. Yes, there was two men there.

Q. Before you were?

A. Yes, before I went there.

Q. Well, did Mr. Salscheider, or any other agent of the company, or officer of the company, tell you anything about any danger connected with that work? A. No, sir.

Q. Did anybody at all tell you anything about any danger?

A. No, sir.

Q. In connection with that work?

A. No, sir.

Q. Will you explain to the jury what kind of a place you had to work in?

A. Yes; it was—I was what they called tailing the edger, and there was a runway there about sixteen feet long, and I was standing inside of a pit about three feet wide, I guess, and about two feet high, and there was a roller back of my back where I stood inside this pit, and there was a whole lot of edgings come out at the same time together, and a few boards probably, and there was a whole lot of edgings come out at this time; and I stooped over to get the edgings, and I raised up my leg to stoop over to catch them, and a wide board, about eighteen or twenty feet long, I should judge, came out from the edger and struck me here, under the knee, and

(Testimony of George Goodwin.)

jammed my leg up against the roller and bruised it, and then there was another board come out and kept pushing that one on; and I stayed in there for a good while, and the boards kept pushing out—it couldn't go back—the saw was there.

Q. These logs that they were sawing, you have already said, I believe, were brought up out of the water? A. Yes, sir.

Q. And you had previously worked on this log deck? A. Yes, sir.

Q. Let's take a log from the water and trace it around till it comes to that edger. Just tell the jury what will happen to a log from leaving the water until it gets to the edger.

A. It is pulled out of the water first, and brought onto the log deck by an endless chain, and taken onto the carriage, and it is put into lumber, and it runs along the live rollers until it comes to the edgerman, and the slabs come running on to where I was working and I had to pull them slabs off, one at each side, besides the boards, and the edgerman puts the boards through this edger, and they come out and pass one at each side of me, and you have just got space to stand—the boards pass close by both legs—just space enough to stand there; then they go on.

Q. How many band-saws are there in this mill?

A. Two band-saws.

Q. Both alike?

A. One is called the big side and the other the small side; one of them cuts all the big logs, and the other cuts the small logs.

(Testimony of George Goodwin.)

Q. Now, at the time you got hurt how many boards were passing through the edger?

A. There was two came out at the same time.

Q. One from each saw?

A. Yes, there was two edgermen edging on this double edger.

Q. What did you do with the edgings—what was it your duty to do with the edgings?

A. I had to pull them off of this edger-table and throw them down on this endless chain, to what they call the slasher saw; that cuts them up into small stuff.

Q. Do you know what that apparatus is called?

A. The endless chain runs along by your feet and takes them to the slasher saws.

Q. Where was that, with reference to height? Was it as high as the table?

A. It was right at your feet; the endless chains was running along on the floor line. I would throw the edgings down at each side.

Q. What did you do with the slabs?

A. Pulled them off the rolls onto the same conveyor, at each side of the table.

Q. And what became of the lumber after it passed you? A. It went on to the trimmer.

Q. From where you were standing—how deep did you say this pit was that you were standing in?

A. About two feet, I should judge.

Q. In performing your labor, in what position did you stand with reference to the edger-saw?

(Testimony of George Goodwin.)

A. I stood face on to the edger-saws.

Q. Let's suppose that the edger-saw was where the first window is, in that direction, this table would represent the edger-table, and you were standing here, in the pit, something like this? A. Yes.

Q. You would put the edgings off to the right or the left? A. They would go at each side.

Q. On either side?

A. They would go on both sides.

Q. You would stand then facing the edger-saw in this direction? A. Yes.

Q. In working, did you ever turn to the right or left?

A. When these edgings were getting away from me, I turned right around from the saw to catch the edgings; I turned around to my left, and this board came out and struck me here (indicating).

Q. I will ask you, taking this illustration, would the large saw be on your right or on your left?

A. It was on my right when I faced the saw.

Q. And the small band was on your left?

A. On the left.

Q. About what distance, do you remember, between the band-saw and the edger?

A. I couldn't exactly tell, from the band-saw to the edger.

Q. About what distance between the end of the edger-table near you and the edger-saw?

A. About sixteen feet, I should judge, from where they come out of the edger until they come to me, the table is sixteen feet.

(Testimony of George Goodwin.)

Q. From the place where you were standing, when the boards came, one from the large band, and one from the small band, would those boards come on the same side of you?

A. One on each side.

Q. At the particular time you got hurt, you say a board came from each of these saws, so that there was one on your right and one on your left?

A. Yes, sir.

Q. And you were standing then between the two boards? A. Yes, sir.

Q. Then you had turned to the left, pushing edgings off the table? A. Yes.

Q. From which of these saws did the wide board come that caught your leg? A. The big saw.

Q. Which side of you was towards this board?

A. When I faced the saw it was my right side, and when I turned around, I turned my side to catch the edgings that was getting away from me.

Q. Was your right foot on the floor of the pit or raised up?

A. I was stooping over catching the edgings, and it was raised up; I didn't see these boards when they came out.

Q. How did you extricate yourself after the board caught you?

A. I tusseled with the board for quite a while until I got it out; I screamed and hollered, and nobody came to me, so I got out as best I could. I lifted the end of the board up as well as I could, and when I lifted it up, of course the saws pushed it out and it run along.

(Testimony of George Goodwin.)

Q. This injury you speak of had occurred before you got at the board to raise it up? A. Yes.

Q. And you say you hollered? A. Yes.

Q. Then what happened next, after you had released yourself?

A. I went out and went downstairs.

Q. How did you get out?

A. I crawled out over the side of the roll and got a piece of edging and helped me downstairs, about the length of my cane, and helped me downstairs; and I looked at my leg and it was bleeding, and my pants was tore; and I came back up—I thought it was only cut—and I went back to work there till six o'clock; and I came back the next day—I was hardly able to walk—and I walked down with the help of my cane, and I worked there the next forenoon; and I went in and told Herman Salscheider I couldn't work no longer, and he told me to go to the company's office and get a ticket and go to the hospital, and so I did.

Q. Who gave you the hospital ticket?

A. He was the cashier in the office.

Q. You don't know what his name was?

A. I think his name was Beebee, as far as I can recollect.

Q. You know the man, do you?

A. Yes, he was the man with the crippled hand.

Q. And he gave you a ticket to the hospital?

A. Yes, sir.

Q. What did you do then?

A. I went to the hospital.

(Testimony of George Goodwin.)

Q. Do you know the name of the hospital?

A. It was called the Coeur d'Alene Hospital.

Q. Do you know what doctor or doctors, if any, attended you there?

A. I didn't know the name of any of the doctors, but I did know the doctor by sight; I didn't know any of the doctors by name—I was a stranger.

Q. What happened?

A. He bandaged my leg up and I stayed there for two days, I reckon; then I didn't think I was getting proper treatment, and I came out and a cab brought me up town to my room, and I got a doctor that came to my room to doctor me, and he doctored me about a week.

Q. What was the condition of your leg?

A. It was pretty bad; I couldn't walk then.

Q. Did it improve any?

A. It improved after I came out of the hospital, and the private doctor I got improved it a little.

Q. Well, where did you go then?

A. Well, I stayed around town there a couple of weeks, limping around with a stick; I thought it was getting better, and as soon as I thought it was getting all right I went to work for the B. R. Lewis sawmill—I went to sweeping up downstairs.

Q. About how long did you stay there?

A. About two weeks.

Q. What was the condition of your leg at that time?

A. It was pretty bad—I suffered pain all the time.

Q. Did you do heavy work there?

(Testimony of George Goodwin.)

A. Only swept up sawdust downstairs with a broom.

Q. Where did you go from there?

A. I went up the Coeur d'Alene River.

Q. Who with?

A. A man by the name of John Bennett.

Q. The same John Bennett who is a witness here?

A. Yes.

Q. What did you do up the Coeur d'Alene River?

A. I was peeling the bark off of trees; they was building a dam and I was barking them.

Q. How long did you stay there?

A. Pretty close to two months.

Q. What was the condition of your leg?

A. I suffered pain all the time.

Q. Where did you next go?

A. I came down to Coeur d'Alene then, and stayed there awhile then, and then I went up to St. Joe.

Q. What did you do there?

A. I run a donkey-engine up there for about seven days.

Q. Who for?

A. For the Flewelling Lumber Company.

Q. Then what did you do?

A. I quit there and came to Coeur d'Alene and went up to Rose Lake.

Q. What did you do at Rose Lake?

A. I was hooking logs on a hoist, hooking them on cars, with a hoisting engine—knobs fastened on to the ends of the logs and loaded onto flat cars—I was putting the hooks in the ends of the logs.

(Testimony of George Goodwin.)

Q. Where did you go from there?

A. To St. Maries.

Q. What did you do at St. Maries?

A. Worked awhile for McCarter Brothers.

Q. Jerry McCarter? A. Yes, sir.

Q. The same Jerry McCarter who is a witness here? A. Yes.

Q. What did you do there?

A. Helped move a house.

Q. What did you do then?

A. I went to work for Stickney, half a mile out of St. Maries; I worked only seven days there, and had to come to the hospital.

Q. During all of this time what was the condition of your leg?

A. It was bad, frightful—I couldn't hardly walk on it.

Q. During this last period at St. Maries, what was its condition?

A. It was getting worse right along.

Q. What was its condition when you left St. Maries?

A. I was pretty near out of my head with pain, and I came to the Harrison Hospital—that was the first hospital I got to—and I was only there about two days when I got out of my head with pain.

Q. Did you have any operation performed on your leg before it was amputated?

A. Yes; Dr. Busbee of Harrison performed two operations.

Q. What did he do?

(Testimony of George Goodwin.)

A. He split my leg open in several places and put tubes through it to drain it out.

Q. Did that help it any?

A. No, sir; it was still getting worse.

Q. He did that operation twice? A. Yes.

Q. Then what next did he do for you?

A. He had to amputate my leg in order to save my life.

Mr. McFARLAND.—I object to that, if your Honor please, and ask that it be stricken out. In the first place, it is not responsive to the question, and is now based upon any knowledge this witness has shown.

The COURT.—All that part of the answer except that which states that he amputated his leg may be striken out.

Mr. McBEE.—Q. About when was this that he amputated your leg?

A. I went in on the 4th of November, and he amputated my leg about the first week of December, as far as I recollect.

Q. Do you know why your leg was amputated?

A. To save my life.

Mr. McFARLAND.—I ask to have it stricken out, if the Court please.

The COURT.—Yes, it may be stricken out.

Mr. McBEE.—Q. Do you know why your leg was amputated?

Mr. McFARLAND.—I object to it, if the Court please, as incompetent, irrelevant, and immaterial, because the testimony of this witness already shows

(Testimony of George Goodwin.)

that his leg was amputated by a physician, and that the witness was out of his head at the time, and therefore could not know, of his own knowledge, why it was amputated, and that the witness has shown himself otherwise incompetent to testify.

The COURT.—Sustained.

Mr. McBEE.—I am not sure, your Honor, that the witness has said that he was out of his head at the time the amputation occurred.

The COURT.—Even so, the objection would have to be sustained.

Mr. McBEE.—An exception.

Q. Well, after your leg was amputated, what became of you?

A. I was four months in the hospital then, Dr. Busbee of Harrison, in his care for four months.

Q. Then where did you go?

A. I came to Coeur d'Alene.

Q. Where did you go next?

A. I went to the county hospital then.

Q. At Rathdrum? A. Yes.

Q. Stand up and show the jury at what point your leg was amputated.

A. It is right there, five inches below my body.

Q. What do you have there—what have you there that you use to walk with?

A. I got an artificial leg.

Q. Will you state to the jury in what manner you suffered prior to the amputation of your leg?

A. Well, I suffered terribly all the time; never could sleep or rest, always suffering pain and agony;

(Testimony of George Goodwin.)

and I had to try to do some kind of work I could do—all my money was gone—I had to work right along after my money was gone—I had no more money; I suffered pain and agony and had to find something to do in order to make a living for myself; I suffered right along ; I had no friends in the country, didn't know nobody, and had to find something to do; I was a stranger there. I suffered terribly right along with my leg. I did the best I could to save it, doctored with it right along.

Q. Have you suffered any during the amputation, and since?

A. I suffered right along, suffering now; my physical health is broken down.

Q. What was your condition as to health prior to this injury?

A. I was always healthy, robust and strong, do any kind of common labor.

Q. What is your health now?

A. My health is broken down.

Q. Outside of missing your leg, have you the same strength in the arms and body? A. No, sir.

Q. Has it affected your rest or sleep?

A. Yes, sir.

Q. In what way?

A. Well, I can't sleep nights; I am weak and nervous, and my constitution is broken down all over.

Q. Prior to this accident, what were your habits as to being industrious or not?

A. I worked hard from the time I was fourteen years old; I had an old mother to support, and—

(Testimony of George Goodwin.)

Mr. McFARLAND.—I object to that, if the Court please.

The COURT.—Yes.

Mr. McBEE.—As to whether or not you always worked.

A. I was sober; I didn't drink nor gamble; I had an old mother to support—

Mr. McFARLAND.—Never mind about that.

Mr. McBEE.—Have you any education?

A. I can read and write English—that is all.

Q. Are you able to make computation or figure?

A. No, sir.

Q. Did you incur any expense or doctor's bills?

A. Yes, I owe the doctor for amputating my leg.

Q. You owe him yet? A. Yes.

Q. Did you spend any money in doctoring and taking care of yourself?

A. Yes, I spent—it cost me about $400 altogether.

Q. Did you have any property?

A. I had some property and it—

Mr. McFARLAND.—I think, if the Court please, I shall object to any further questioning on that line; I think it is not material—it isn't an element of damage here.

The COURT.—I can't see how it is.

Mr. McBEE.—Q. Did you know at the time you were injured that this was a dangerous place to work?

A. No, sir.

Q. Do you now know that it was?

Mr. McFARLAND.—I object to that, if your Honor please, as calling for an opinion and conclu-

(Testimony of George Goodwin.)

sion of the witness, without showing any qualification on which to base that opinion, and it doesn't call for any specific facts or testimony which would go to prove that it was a dangerous place.

The COURT.—The objection will be sustained to the present question.

Mr. McBEE.—Q. Mr. Goodwin, what was the shape of this pit in which you were required to stand and work?

A. It was about three feet long and about two feet high.

Q. Were the sides and ends—

A. It is all boxed in; you stand right inside, in a pit; it is all closed in at each side.

Q. Were the sides and ends straight up and down, or inclined?

A. They were straight up and down.

Q. And as you were caught by this board on your right leg—I understood you to say that the board pressed against your right leg—what was the other side of your leg pressed against?

A. Against the roller.

Q. Where was this roller?

A. Back on the back side.

Q. What was this structure back of the edger-table?

A. There was a roller placed right on the edge of where your back would be up against; there was a roller there that would take the lumber on to the trimmer.

(Testimony of George Goodwin.)

Q. What was beyond this other roller—let this table represent the edger-table?

A. It was just a roller on the edge of the pit back of your back.

Q. What was back of the roller?

A. The trimmer-table was back of that; that dropped down on the trimmer-table, stood below that.

Q. The roller was on the top of the—

A. Yes, and the boards came along and dropped down on rollers here.

Q. Your leg then was between the roller—

Mr. McFARLAND.—I object to this, if the Court please.

Mr. McBEE.—What was your leg between, then, when it was caught?

A. It was between the end of the board and the roller back at the back edge of the trimmer.

Q. Did you at any time that you worked there before this injury occurred have any assistance?

A. Yes; the first day I worked there he gave me a man to work with me there, to help me to throw them off; he give me a man for about two days.

Q. After that did you have any assistance?

A. No, sir.

Q. Did you ever receive any other injury—

A. No, sir.

Q. In that leg than that which you have described? A. No, sir.

Q. Neither before that time nor after that time?

A. No, sir.

Q. Did you, after that accident had occurred

(Testimony of George Goodwin.)

which you spoke about and described—being caught by the board—did you at any of the other places you worked receive any additional injury to that leg?

A. No, sir, never.

Cross-examination.

(By Mr. McFARLAND.)

Q. When did you first commence work for the Coeur d'Alene Lumber Company, what date?

A. I couldn't exactly give the date; it was sometime in May, 1907.

Q. Didn't you commence in April?

A. No, sir; I don't think so; to the best of my knowledge, I didn't.

Q. Didn't you work as deckman from the 16th of April, 1907—

A. I don't think so; to the best of my knowledge, it was in May I started to work.

Q. How long did you work as deckman?

A. I didn't take the time—I don't exactly know.

Q. Don't you know how many days?

A. I worked there somewheres about three weeks, I guess, on the deck.

Q. Before you commenced tailing the edger?

A. Yes.

Q. Now, do you remember whether it was in May or April that you commenced tailing the edger?

A. It was in June I commenced tailing the edger.

Q. Are you sure of that? A. Yes, sir.

Q. Didn't you work tailing the edger all of May except the 30th and 31st? A. No, sir.

Q. Are you sure of that? A. Yes, sir.

(Testimony of George Goodwin.)

Q. When do you say you first commenced tailing the edger?

A. Somewheres around the first week in June.

Q. About what day?

A. I don't remember exactly.

Q. Don't you remember any day?

A. No, sir.

Q. How many days did you work tailing the edger in June?

A. As far as I can remember, about eight or nine days.

Q. Now, Mr. Goodwin, isn't it a fact that you worked from the 16th of April and the rest of the month, as deckman, and that you worked the full month of May tailing the edger, with the exception of the 30th and 31st? A. No, sir, I did not.

Q. Did you work there on the 30th and 31st of May? A. I couldn't tell you.

Q. Do you remember when you quit work for the Coeur d'Alene Lumber Company?

A. No, sir; I wouldn't remember the date; it was somewhere the first week of June.

Q. Did you work for the B. R. Lewis Lumber Company at any time between the date when you first commenced work for the Coeur d'Alene Lumber Company, and the date you quit work for the Coeur d'Alene Lumber Company?

A. I don't understand.

Q. Well, did you do any work at the B. R. Lewis sawmill between the dates that you worked for the Coeur d'Alene Lumber Company? A. No, sir.

(Testimony of George Goodwin.)

Q. Are you sure of that? A. Yes, sir.

Q. Now, didn't you work for the B. R. Lewis Lumber Company on the 30th and 31st of May, 1907?

A. No, sir; I don't think I did. I only worked about two weeks for the B. R. Lewis Lumber Company altogether, and that was after I left the hospital, after I quit the Coeur d'Alene Lumber Company and left the hospital.

Q. Do you say that you didn't work for the B. R. Lewis Lumber Company at all until after you had quit working for the Coeur d'Alene Lumber Company? A. Yes, sir.

Q. And after you commenced working for the B. R. Lewis Lumber Company you didn't go back and work for the Coeur d'Alene Lumber Company?

A. No, sir, I did not.

Q. You are sure of that? A. Yes, sir.

Q. Now, isn't it a fact that you worked, after working in May tailing the edger, that you went back and worked a day and a half on the 1st and 3d day of June, 1907, on the deck again?

A. No, sir; I did not.

Q. And then didn't you, on the 3d and 4th days, work half a day on June 3d, and another half day on June 4th, tailing the edger there at Coeur d'Alene?

A. From the time I left the log-deck and came back to the edger, that is the only job I got.

Q. You say you didn't do anything but sweep while you were working for the B. R. Lewis Lumber Company?

(Testimony of George Goodwin.)

A. The first day I was working there I was hauling boards for a millwright.

Q. Do you know who was the time-keeper of the B. R. Lewis Lumber Company?

A. I know him by sight.

Q. Is he here in this city? A. I guess.

Q. You have seen him here as a witness?

A. Yes, sir.

Q. He gave you your time? A. Yes, sir.

Q. He kept the time? A. Yes, sir.

Q. Are you willing to swear that you did not work for the B. R. Lewis Lumber Company on the 30th and 31st days of May, 1907?

A. I don't remember—I don't remember—I ain't —I don't remember when it was.

Q. Now, Mr. Goodwin, you said you got hurt in June, didn't you? A. Yes, sir.

Q. And you say you didn't work for the B. R. Lewis Lumber Company until after you got hurt and quit the Coeur d'Alene Lumber Company?

A. Yes, sir.

Q. Wouldn't you know whether or not you worked on the 30th and 31st of May for the B. R. Lewis Lumber Company?

A. I don't remember; I don't believe I did.

Q. Are you willing to swear now that while you were working at different times for the Coeur d'Alene Lumber Company that you did not go and work for the B. R. Lewis Company?

A. I never worked between times for them; when I worked for the Coeur d'Alene Lumber Company

(Testimony of George Goodwin.)

and left the hospital I went to work for the Lewis.

Q. How many days did you work for the B. R. Lewis altogether?

A. It was somewheres about two weeks, I guess.

Q. Isn't it a fact that you only worked five days?

A. I worked more than that, if I remember right.

Q. Didn't you work two days in May and three in June for the B. R. Lewis Company?

A. I worked for them more than that; I worked pretty close to two weeks.

Q. Didn't you commence working for the B. R. Lewis Lumber Company on the 13th, and work the 13th, 14th and 15th days of June, 1907?

A. I don't remember the dates.

Q. But you are sure that you worked two or three weeks?

A. I worked about two weeks, I am pretty near sure.

Q. Now, what day of the week was it when you received this injury that you have testified about?

A. I don't know.

Q. Didn't you know whether it was the first part of the week, or the middle of the week, or the last of the week?

A. As far as I can remember, it was the middle of the week.

Q. Was it about Wednesday or Thursday?

A. I don't know which day it was.

Q. Don't you keep track of Sundays?

A. Yes, sir.

Q. How near to Sunday was it?

(Testimony of George Goodwin.)

A. I wouldn't just remember what day of the week it was; I know it was somewhere around Wednesday or Thursday, some day.

Q. What time of the day was it when you received this injury? A. In the afternoon.

Q. What time in the afternoon?

A. I didn't look at the time.

Q. How near to the noon hour was it?

A. It was after dinner.

Q. How near to the noon hour after dinner?

A. Somewheres about two or three o'clock.

Q. When do you usually commence work there at the Coeur d'Alene sawmill, what time in the morning? A. Seven o'clock.

Q. And what time did you quit for dinner, or noon? A. Twelve o'clock.

Q. What time did you commence work again?

A. One o'clock.

Q. What time did you quit in the afternoon?

A. Six o'clock in the evening.

Q. And you think it was about half way between noon and six o'clock, do you?

A. About two or three o'clock in the afternoon.

Q. Was there any man there assisting you tailing the edger at that time? A. No, sir.

Q. Was there anyone near you at that time?

A. Not that I know of, nearer than the men that were operating the work.

Q. Do you know a man by the name of Albert Bro, who was working at the slasher at that time?

(Testimony of George Goodwin.)

A. I know him by sight; I know the man that was working at the slasher at that time.

Q. Where was he when you got hurt?

A. I don't know.

Q. How far did he usually work from where you worked?

A. I don't know how many feet; he worked on the slasher.

Q. How far was this slasher from this box in the edger? A. I don't know how many feet it was.

Q. Can't you approximate it, make an estimate?

A. No, I couldn't give no—

Q. Was it as far as from you to me?

A. Pretty close to that, I guess.

Q. Just about that distance? Wasn't he in sight of you all the time you were tailing this edger?

A. I couldn't say; I couldn't see him all the time.

Q. There wasn't anything to prevent you from seeing him if you had looked in that direction?

A. I didn't have time to look in that direction; I could have seen him, I guess, if he was there.

Q. Was he behind you or in front of you?

A. Back of me.

Q. Could he see you all the time you was working? A. I don't know, sir.

Q. Do you know a boy working there at that time by the name of Eric Ostblom? A. No, sir.

Q. Wasn't there a boy there working alongside of you at this edger all the time you did work at the edger? A. No, sir.

Q. You are sure of that?

(Testimony of George Goodwin.)

A. No, there was nobody helping me the day I got hurted.

Q. Was there anybody helping you any other time? A. Yes, when I first started in.

Q. What kind of a looking man was this?

A. He was a young boy, a young man.

Q. A boy about seventeen or eighteen years old, wasn't he? A. Probably about that.

Q. At the time you got hurt there was nobody there? A. No, at the time I got hurted.

Q. You was pushed down into this pit, as you call it, were you—

A. I was pushed over—I leaned over to catch the edgings that were getting away from me, and the board came out and struck me.

Q. Did you get down to the bottom of the pit?

A. No, I was thrown against the side of the pit, against the roller.

Q. Were you leaning backwards?

A. I was leaning on my side.

Q. Did you get down on the floor at all?

A. No; if I got down on the floor I would get away from the roller.

Q. Where did this board you speak of first strike you? A. About under the knee.

Q. Right under, or below, or above?

A. About there (pointing).

Q. Right at the knee-joint? A. Yes.

Q. On the right-hand side, on the inside?

A. Yes.

(Testimony of George Goodwin.)

Q. And from which direction did this board come that struck you there?

A. It came out from the edger.

Q. On which side of you—the right or left?

A. When I was facing the edger, it came out at my right.

Q. And struck you on the right-hand side?

A. I was turned sideways from it.

Q. What was you turned for?

A. I was turned to catch the edgings that were getting away from me.

Q. Say for instance, that this was the edger-table, there was the saws; these boards come through there on rollers, do they not? A. Yes.

Q. They come on down here on rollers, and you are supposed to take this edgings and just toss it off on both sides? A. Yes.

Q. At the time you were caught here on the inside of your knee-joint, what caused you to turn around in this box so that this board would strike you?

A. A bunch of edgings came out at the time.

Q. Where? A. Out of the edger.

Q. On which side of the edger, on which side of the table? A. On the small side.

Q. On the left-hand side?

A. Yes; they were going off on the trimmer, and I had to lean over to catch them.

Q. Did you have to turn clear around, with your side to the right-hand board?

A. I turned right around to catch them.

(Testimony of George Goodwin.)

Q. What was becoming of the tailings on the right-hand side?

A. They were getting away, too.

Q. What caused that unusual rush of tailings at that particular time?

A. Sometimes a whole lot of long ones come, and they break off.

Q. And there was no one there at that time?

A. No.

Q. At the time this board struck you right in there, did it, and it pushed you back against this roller? A. Yes.

Q. Did you fall back on the roller?

A. Yes, sir.

Q. Did you fall back on the roller?

A. No, sir.

Q. Did your right leg get up against the roller at all? A. Yes.

Q. How did that happen?

A. The board pressed it up against it.

Q. Then you must have faced in this direction when the board pressed you that way?

A. I turned around to try to get free.

Q. Did you at any time have your face toward this end of the slasher-table, towards the trimmer?

A. Yes.

Q. And your back toward the saws?

A. Yes.

Q. Didn't hurt this other leg, did it?

A. No, sir.

Q. And there was no one there at that time?

(Testimony of George Goodwin.)

A. No, not that I see.

Q. Now, when you got up and got these boards straightened, what did you do?

A. I got out as soon as I could.

Q. Where did you go?

A. I went downstairs in the sawmill, picked up a piece of edging and helped myself downstairs.

A. And this sawmill, this edger-table, is upstairs, is it? A. Yes, sir.

Q. There is quite a flight of stairs from the ground up to the floor where this edger table is?

A. Yes.

Q. And you picked up a piece of edging and helped yourself downstairs? A. Yes, sir.

Q. It took you a long time to get down, did it?

A. Quite a while.

Q. You was pretty badly hurt?

A. Yes, sir.

Q. What did you do then?

A. I rested up a while.

Q. How long did you rest?

A. About ten minutes, I reckon, as far as I know.

Q. You walked upstairs again? A. Yes, sir.

Q. Anyone help you up? A. No, sir.

Q. What did you do when you got upstairs?

A. I went back to my work again.

Q. Did you find anyone there at that time?

A. There was somebody there.

Q. Who was there? A. I don't know.

Q. Did you ever see him before?

A. Somebody around the mill, I guess.

(Testimony of George Goodwin.)

Q. Hadn't you ever seen this man that you found there at the mill before? A. I don't know.

Q. Was it Salscheider?

A. No, sir, it wasn't him.

Q. What was he doing when you returned to this edger? A. He was doing my work.

Q. Was there anyone else there but him?

A. That was all.

Q. Then, what did he do when you came back to the edger-table?

A. I went in and took the place and he left.

Q. Did you say anything to him?

A. Yes, I told him I was hurt.

Q. Did he ask you where you had been?

A. Well, I don't remember.

Q. Was that man in sight when you left the edger-table to go downstairs?

A. No, sir, I didn't see him.

Q. Nobody was in sight? A. No, sir.

Q. How long did you say you were gone altogether from the time you got out of the box until you returned? A. About ten minutes.

Q. The mill was still going on? A. Yes, sir.

Q. And these tailings still going on?

A. Yes, sir.

Q. Was the table clear of edgings when you came up?

A. This man had them clear; this man who was working there had them clear when I came back.

Q. When you were tailing the edger what was Salscheider doing all of these times?

(Testimony of George Goodwin.)

A. I don't know.

Q. Didn't you see him there working around?

A. He used to be all over the mill.

Q. Wasn't he always in sight of the edger?

A. No, not always.

Q. That man who took your place wasn't a man who worked at the slasher, was he?

A. I couldn't tell you, sir.

Q. Have you seen him since that time?

A. No, sir.

Q. Never saw him after that time?

A. No, sir.

Q. You say it tore your pants? A. Yes, sir.

Q. Did he tell you that you had better quit working in the edger?

Mr. McBEE.—I object to what this unknown man told the plaintiff after the accident.

The COURT.—Overruled.

Mr. McBEE.—Exception.

A. No.

Mr. McFARLAND.—Q. Did he tell you how he came to find out that you wasn't tending to the edger?

A. No; he didn't say nothing to me, only jumped out of there and I went in.

Q. Just as quick as you got up there he jumped out of this box and went away? A. Yes, sir.

Q. He didn't ask you where you had been or anything of that kind? A. No.

Q. Now, how long did you work after you got hurt there?

A. As far as I remember, I worked about two or

(Testimony of George Goodwin.)

three days there, or a day and a half, or something—a day and a half, I guess.

Q. You worked the rest of that day, did you?

A. I worked that evening and the next day, and to noon the next day.

Q. You worked all that afternoon that you was hurt except this ten minutes; then you went back there the next morning and worked, did you?

A. Yes.

Q. And worked all of that day?

A. Yes, sir.

Q. And the next day, you worked all of that day?

A. The next day at noon I quit.

Q. Then where did you go?

A. I went to the hospital.

Q. You didn't quit until the noon hour, did you?

A. No, sir.

Q. Was anyone helping you when you quit?

A. I don't remember, but I think there was a man there when I quit; I think he was helping me the day I quit, if I remember right.

Q. Was that this boy?

A. I don't know, sir.

Q. How long were you in the hospital?

A. I stayed in the Coeur d'Alene Hospital about two or three days, I think, or a day and a half—one or the other.

Q. How many nights did you stay there?

A. Either one or two nights; I am not sure.

Q. And what did you say this doctor did for you?

A. He bandaged my leg.

(Testimony of George Goodwin.)

Q. What did he put on it?

A. I don't know what he put on it; he bandaged it right from my ankle to my hip.

Q. How many visits did that doctor make to you?

A. He came twice or three times, if I remember right.

Q. Were there any nurses there? A. Yes.

Q. Did they wait on you too? A. Yes.

Q. Were the nurses present when this doctor treated your leg? A. Yes, sir.

Q. Don't you know that doctor's name?

A. No, sir.

Q. Didn't you hear the nurses call his name?

A. No, sir.

Q. Did you ever see him anywhere else except in that hospital? A. I am not sure.

Q. Did you ever go to his office in town?

A. No, not that I know of.

Q. If you had, you would have known it, wouldn't you? If you had gone to this physician's office after that, you would have known it, wouldn't you?

A. There was one doctor there, and he looked pretty much like him.

Q. What kind of a looking man was this doctor?

A. He was a big tall man, fat and red-faced.

Q. Did he have any beard? A. No, sir.

Q. Did he have a moustache? A. No, sir.

Q. What kind of hair did he have?

The COURT.—Why is this important?

Mr. McFARLAND.—I want, if possible, to locate this doctor; I would like to locate this doctor. There

(Testimony of George Goodwin.)

are matters I have in view that I don't think would be proper to state in the presence of the jury.

The COURT.—Very well.

Mr. McFARLAND.—Q. I will ask you this: Was his name Woods? A. No, sir.

Q. Was his name Scallon?

A. No, sir; I know a Doctor Scallon.

Q. Was his name Craik?

A. I think it was, if I remember right.

Q. A big, tall, stout fellow, rosy faced?

A. Yes, sir.

Q. Rather light hair, didn't he?

A. Yes, sir.

Q. Smooth faced? A. Yes, sir.

Q. Now, where did you go when you left the hospital?

A. I went up to my room and got Dr. Watts to doctor my leg.

Q. Did Dr. Watts attend upon you?

A. Yes, sir.

Q. How long did he attend upon you?

A. He came to me about a week, I guess, to my room, and doctored me there.

Q. How many visits did he make?

A. He made either four or five visits.

Q. You are sure that this was Dr. Watts?

A. Yes, sir.

Q. How long did you stay in your room?

A. I stayed about a week there; then I was able to get out and go around town with a stick, hobble around, but I wasn't well then.

(Testimony of George Goodwin.)

Q. Where did you go then, after you left your room?

A. Went to work for the B. R. Lewis Lumber Company.

Q. Was you lame when you went there?

A. Yes, sir.

Q. Do you know Mr. Fred Amsbaugh, the time-keeper there? A. I know him by sight.

Q. Did you see him when you were working there? A. I must have seen him, I guess.

Q. All the time you was working there you was walking lame?

A. I was walking lame at first, but the last couple of days I was walking better.

Q. Did you tell Mr. Amsbaugh about having been hurt at the Coeur d'Alene?

A. I didn't tell him; I told the foreman there at that time.

Q. Did you ever tell Amsbaugh about being crippled or hurt, or complain in any way?

A. No, I never said nothing to him, I don't think.

Q. What did you do when you were there?

A. I was sweeping sawdust, only the first day, when I helped haul boards for a millwright.

Q. You didn't load logs? A. No, sir.

Q. You didn't work in the planer?

A. No, sir; never worked in a planer in my life.

Q. You say you worked there how long?

A. If I remember right, pretty close to two weeks.

Q. Did you work every day during those two weeks?

(Testimony of George Goodwin.)

A. Yes, I worked straight out from the time I started till I quit.

Q. What did you quit working there for?

A. I went up the river then to work for the Bunker Hill & Sullivan.

Q. Why did you quit working for the B. R. Lewis mill?

A. I got more money in the job I was going to.

Q. Who employed you to work in the Bunker Hill & Sullivan?

A. A man by the name of Babbitt; I went up with a man by the name of Bennett, and he told him to take a man or two with him.

Q. You went up there with Bennett?

A. Yes, sir.

Q. That is the reason you quit? A. Yes.

Q. And there was no other reason?

A. I quit to get better wages.

Q. What did you do for the Bunker Hill & Sullivan?

A. I was peeling bark most of the time.

Q. What do you mean by peeling bark?

A. They were building a dam, and I was peeling bark off the logs.

Q. How long did you work for the Bunker Hill & Sullivan at that work?

A. About forty-five days.

Q. Right along? A. Yes, sir.

Q. Didn't miss a day for all that time, did you, except Sundays?

A. That is all, but I suffered pain.

(Testimony of George Goodwin.)

Q. Did you do any other work besides peeling bark at that time?

A. Different little things around the camp, I done; split wood, once in a while.

Q. When you quit work for the Bunker Hill & Sullivan Company, where did you go?

A. I came down to Coeur d'Alene.

Q. What did you do at Coeur d'Alene?

A. I didn't do anything.

Q. How long did you stay at Coeur d'Alene?

A. A day or two.

Q. Then where did you go? A. St. Joe.

Q. What did you do up at St. Joe?

A. Run a donkey-engine up there.

Q. For whom?

A. Flewelling Lumber Company.

Q. What work was this engine engaged in doing?

A. Pulling logs off a hillside.

Q. Did you run it as engineer?

A. Yes, sir.

Q. How long did you work for Flewellings?

A. Seven days.

Q. Work straight along without missing a day?

A. I worked seven days.

Q. Then you quit working for them, did you?

A. Yes, sir.

Q. Then where did you go?

A. Went to Rose Lake.

Q. Did you work for the Rose Lake Lumber Company?

(Testimony of George Goodwin.)

A. I worked for a jobber that was putting in logs for the Rose Lake Company.

Q. What did you do in that work?

A. Hooking logs they were putting on flat-cars.

Q. How were those logs hooked—with common cant hooks or with an engine?

A. There was an engine lifted them and we had hooks, and the engineer would pull them up on top of the load.

Q. What were these—sawlogs?

A. Yes.

Q. How long did you work at that work?

A. About twenty-five days.

Q. Straight along without missing a day?

A. Yes.

Q. What did you do after you left there?

A. I came to Coeur d'Alene again.

Q. How long did you stay at Coeur d'Alene?

A. Probably a day or two again.

Q. Did you do any work there then?

A. No.

Q. Then where did you go, after leaving Coeur d'Alene this time? A. Went to St. Maries.

Q. What did you do at St. Maries?

A. Went to work for McCarter Brothers, moving a house.

Q. Do you remember the house you moved?

A. It was a saloon belonging to a man by the name of Demers.

Q. How many days did you work for Jerry McCarter altogether? A. I couldn't tell you.

(Testimony of George Goodwin.)

Q. Do you remember what month that was?

A. It was late in the fall.

Q. Didn't you commence work for McCarter on the 15th of October, 1907, and worked that day, the 16th, the 17th, 18th, 19th, 21st, 22d, 23d, 24th, 25th, and the 26th, making fifteen days in all?

A. Yes, probably, that was about the time.

Q. Now, in moving that house, what did you have to do?

A. Just put jack-screws under the side of the building and screw them up.

Q. Wasn't it heavy work?

A. *Now,* very heavy; there was a whole lot of us,

Q. Didn't you have to get into the mud and slush?

A. We sat down most of the time doing that work.

Q. Didn't you have to wear rubber shoes or boots?

A. No, sir.

Q. Wasn't that house being moved into a marshy place?

A. There was another man working at it before I went there.

Q. Wasn't it pretty heavy work?

A. No, not so heavy; I was putting in rollers or screwing it up.

Q. Was you lame at that time?

A. My leg was paining me right along at that time.

Q. You were a little lame or crippled?

A. Yes.

Q. Did you tell McCarter about being hurt or being crippled? A. I don't remember if I did.

(Testimony of George Goodwin.)

Q. Had you ever worked in a logging camp, or in or about a sawmill before you went to Coeur d'Alene? A. I had worked in a logging camp.

Q. What did you do there?

A. Swamped most of the time, and sawed a couple of times.

Q. That was in a sawmill?

A. No, sawed logs in the woods.

Q. You never worked in a sawmill before?

A. No, never; I worked on a wood machine that was connected with a sawmill, but I never worked for a sawmill before I worked for the Coeur d'Alene Lumber Company.

Q. Are you a married man? A. No, sir.

Q. When you went to work, didn't you tell Salscheider you was a married man and wanted work?

A. No, sir; I did not; never told nobody I was a married man.

Q. Do you know how long that edger-table is from where the logs come in on to the rollers?

A. I never measured, but so far as I can judge, it is about sixteen feet—I never measured it.

Q. Do you know how wide this place is, the width of it across in this direction like this is the table, and here is the space you call the pit, do you know how wide it is this way?

A. I guess it is about two feet and a half probably.

Q. Would you swear it wasn't more than five feet at the time you worked there?

A. I don't know, sir.

(Testimony of George Goodwin.)

Q. Would you swear it wasn't five feet?

A. I wouldn't swear; I am not sure about it.

Q. Do you know how long the opening was, this way?

A. As far as I remember, it was about three feet, two or three feet, probably; I am not sure about it.

Q. So you think it was about three feet square?

A. Yes.

Q. How deep was this?

A. About two and a half, probably, high, deep.

Q. Two and a half from the bottom of the floor?

A. Yes,

Q. This slasher, the carriage for the slasher was two feet lower than this end of the edger-table, wasn't it?

A. The one that carried the edgings to the slashers?

Q. Yes. A. Somewheres about that.

Q. I ask you, Mr. Witness, to examine that photograph, and see what you say as to that being a good likeness of that edger-table:

(Hands witness photograph.)

Mr. McBEE.—I would like to examine it before he answers the question.

Mr. McFARLAND.—I wasn't going to introduce it in evidence until I had shown it to you; I have no objection.

Q. That is what you call the edger-table?

Q. Do you recognize that?

A. There was no blocks there—I don't exactly remember it there about where I was working.

(Testimony of George Goodwin.)

Q. Now, I will ask you to look at this photograph and state whether or not, in tailing the edger, you stood in this space that is represented in this picture or photograph—I had better mark that, I think—marked 1.

Mr. McBEE.—I suggest that it be identified.

(Marked Defendant's Exhibit "A," for identification.)

A. Yes, that is about—

Mr. McBEE.—I object to the question, for the reason that the witness has said that this photograph does not appear to him to be a likeness of the place where he was injured. In other words, he doesn't recognize that as a photograph of that particular place.

The COURT.—Do you intend to offer, this Mr. McFarland?

Mr. McFARLAND.—I will, perhaps, later on, your Honor, not now. I just want a more definite description of that edger-table, that is all, and I thought perhaps by exhibiting this photograph I could get that information from this witness.

The COURT.—Unless he identifies the photograph as being representation of the place, I am of the opinion that he ought not to be asked to say whether that represents the particular place in which he stood; that might untimately be misleading.

Mr. McFARLAND.—I will then ask this question: State whether or not the photograph is a good representation of the edger-table at which you worked at the time when you received this injury?

(Testimony of George Goodwin.)

A. It looks wider to me than the edger-table was.

Q. With that exception it is otherwise like?

A. It looks like where the rollers would be; that is the only thing that makes it look to me like the edger-table.

Q. Is because the rollers are there?

A. Yes, them two places there (indicating).

Q. Was the edger-table that you worked at like the edger-table represented in this photograph?

A. Not exactly.

Q. In what respect did it differ?

Mr. McBEE.—I object to this comparison to something entirely without the record.

The COURT.—He may proceed a little farther and we will see. Answer the question.

A. I can't see where the saws are, now it don't look like the inside of the mill to me.

Q. Isn't the saws ahead there forward?

A. I don't see them.

Q. I will ask you, could you see, from where you stood, tailing the edger, could you see the saws in that sawmill?

A. I could see—I couldn't exactly see the saws; I could see the wheels where they were going around.

Q. Isn't it a fact that from where you stood in this box that you couldn't see any part of either of these saws?

A. If I stood out at the outer edge I could see them, but not standing in the center of it there.

Q. How tall are you, Mr. Goodwin?

A. About five foot, eleven, I presume.

(Testimony of George Goodwin.)

Q. Do you know the length of your limb from the bottom of your foot up to the joint of your knee?

A. No, sir, I don't know.

Q. Will you take this rule and show to the jury what the length is from the bottom of your foot up to the joint of your knee—just measure it.

A. (Witness takes rule and measures.) About twenty-eight inches to the joint of my knee.

Mr. McBEE.—Take this rule and try it.

(Witness takes rule and measures.)

Mr. McFARLAND.—How much is it? Twenty-two inches, isn't it?

A. Twenty inches, I think.

Q. Now, was this a piece of tailing of a piece of board that struck you? A. It was a board.

Q. Was it a long board? A. Yes, sir.

Q. A very long board? A. Yes, sir.

Q. The end of the board had to dip down in order to strike you?

A. No, I raised up my leg when I stooped over.

Q. Will you stand here between these two tables and show the Court and jury the position you occupied when this board struck you on the knee.

A. Yes, sir. (Witness takes position between tables.)

Q. Say, for instance that this is the board; now, just show the jury and the Court your position at the time it struck your knee.

A. The board was coming out this side of the table, one here and one here; the edgings was coming at both sides of the boards, at both sides there was

(Testimony of George Goodwin.)

edgings, here and here, and there was two edgings on each board, four edging altogether, sometimes more than that coming, cut off double—two boards would come out on top of each other, and there was a whole pile of them getting away from me, and I turned around for to catch these edgings, and I leaned over and raised my leg up like this (indicating), and the board came out here and struck my leg here (indicating).

Q. Show the position of the board.

A. The board came straight across the roller like that, and hit me on the leg.

Q. But it hit you on the inside of the knee?

A. It hit me here (indicating).

Q. You had to have your knee up on a level with the top— A. I leaned over like that.

Q. I say you would have to have the inside of your knee on a level with the top of this table?

A. Yes.

Q. And you had your foot away off the ground, did you? A. Yes, sir.

Q. And you turned your leg around with the back part of it or the inside of it toward the edger-table?

A. I turned around just then and the board caught me.

Q. How long was this board that struck you?

A. Between eighteen and twenty feet, I should judge.

Q. You are sure it was at least eighteen feet long, are you? A. Yes, sir.

Q. What became of that board?

(Testimony of George Goodwin.)

A. Well, I don't know what became of it.

Q. Did it go on to this other table, the slasher?

A. I guess it did; as soon as I pulled out my leg it drove out from the saws.

Q. Did you ever have anyone else tend to your leg except Dr. Wood and Dr. Craik, and this Dr. Busbee—I mean Dr. Watts?

A. That is the only doctors I had.

Q. How long after you quit working at St. Maries was it before you went to this hospital?

A. I worked four or five days in the woods about half a mile out of St. Maries.

Q. For whom?

A. A fellow by the name of Stickney.

Q. What did you do for Stickney?

A. I sawed logs.

Q. Was that all you worked—four or five days?

A. That was all.

Q. Where did you go from there?

A. To the hospital.

Q. What day did you get there?

A. About the 4th of November.

Q. How long were you there before you had your limb amputated?

A. Some time the first of December, my limb was amputated.

Q. Isn't it a fact, Mr. Goodwin, that you hurt that limb after leaving the Coeur d'Alene Lumber Company? A. No, sir.

Q. Isn't it a fact that you hurt that leg after working for McCarter up there moving that house?

(Testimony of George Goodwin.)

A. No, sir.

Q. Did you ever have a doctor at St. Maries look at it? A. No, sir.

Mr. McFARLAND—I believe that is all for the present; I may ask to recall him latter on for further cross-examination.

Redirect Examination.

(By Mr. McBEE.)

Q. I wish you would state clearly to the jury just about where the board caught your leg?

A. Just right about where my fingers is, about there.

Q. How far above the knee is that?

The COURT.—Below the knee?

A. Right about there.

Mr. McBEE.—Is that above or below the knee-joint?

A. I guess that is above the knee-joint.

Q. What part of your leg was pressed against the rollers?

A. This part of my leg was pressed against the roll, and the board was against here.

Q. Was that higher up or lower down than the point where the board was pressing against it?

A. Lower down, a little bit.

Q. The pressure was all above the knee, was it?

A. Yes, right about here.

Q. And these wounds and bruises which caused you the pain, where were they?

A. They were right here, where the board struck me.

(Testimony of George Goodwin.)

Q. Were they on the front or back of your leg?

A. On the back.

Q. What was the position of your left leg at the time you were caught by the board?

A. It was reached out under me.

Q. Your left leg? You were standing on your left leg.

A. Yes, holding myself up with my left leg.

Recross-examination.

(By Mr. McFARLAND.)

Q. How long did you say you were tailing the edger there for the Coeur d'Alene Lumber Company before you received this injury—how many days?

A. I couldn't tell you how many days; I was there eight or nine days altogether, as far as I can remember right; I may be out a little, I am not sure; I never kept no account of it.

[Testimony of John Bennett, for the Plaintiff.]

Witness was excused, whereupon JOHN BENNETT was produced as a witness on behalf of plaintiff, was first duly sworn, and testified as follows:

Direct Examination.

(By Mr. MORGAN.)

Q. You may state your name, residence and occupation.

A. John Bennett, Coeur d'Alene City.

Q. How long have you lived at Coeur d'Alene?

A. Three years.

Q. Do you know the plaintiff, George Goodwin?

A. Yes, sir.

(Testimony of John Bennett.)

Q. How long have you known him?

A. Five years.

Q. Where did you first know him?

A. In Washburn, Wisconsin.

Q. Where did he come from there, if you know?

A. Why, he came from Ireland.

Q. State the circumstances of your meeting, and how you came to know him at that time.

Mr. McFARLAND.—I object to that as immaterial, if the Court please.

The COURT.—Sustained.

Mr. MORGAN.—Q. When did you first meet George Goodwin in Idaho, and where?

A. I met him in Coeur d'Alene City; he came to my house.

Q. When was that?

A. He came off the coast; he had been to the coast and then came back to my place at Coeur d'Alene some two years ago.

Q. Do you know whether or not he ever worked for the Coeur d'Alene Lumber Company?

A. I think he has worked for them some.

Q. About when?

A. I think some time during the month of May, 1907.

Q. How long did he work there, if you know?

A. I couldn't say just how long he did work.

Q. Did he ever, at any time during the summer of 1907, work with you? A. Yes, sir.

Q. State as near as you can between what dates, and the circumstances?

(Testimony of John Bennett.)

A. Why, from the first of July until the latter part of August.

Q. Where and for whom were you working?

A. For the Bunker Hill & Sullivan Mining Company, on the North Fork of the Coeur d'Alene River.

Q. How did you happen to go up there with Goodwin?

A. I took a job building a dam there for the Bunker Hill & Sullivan through a foreman that was looking out for their work, and took him along with me.

Q. What did he do?

A. He helped me prepare the timbers, preparing to hew, and hewing timbers for the dam.

Q. How long did you work there?

A. Two months.

Q. What did you do after you finished your work there?

A. I went back to Coeur d'Alene and went to work for the Colquhoun Hardware Company.

Q. Did he accompany you to Coeur d'Alene?

A. Yes, sir.

Q. Do you know anything about an injury that he claims to have received while working in the mill of the Coeur d'Alene Lumber Company?

Mr. McFARLAND.—I object to that, if the Court please.

The COURT.—He may answer yes or no.

A. Yes, sir.

Mr. MORGAN.—Q. Do you know about when he was injured?

A. I don't know just any particular time.

(Testimony of John Bennett.)

Q. During the time you worked with him, how closely associated were you with him?

A. We were together all the time, and slept together.

Q. Did you know of any injury at that time—him receiving at that time? A. No, sir.

Mr. McFARLAND.—I object to that as immaterial and irrelevant, if the Court please, and incompetent, and also leading and suggestive.

The COURT.—Overruled.

Mr. McFARLAND.—An exception.

Mr. MORGAN.—Do you know of his complaining of any hurt at that time? A. Yes, sir.

Mr. McFARLAND.—I ask to have that answer stricken out, for the purpose of an objection.

The COURT.—Yes.

Mr. McFARLAND.—I object to the question, if the Court please, on the ground that it calls for self-serving statements and declarations of the plaintiff, and as incompetent, irrelevant, and immaterial.

The COURT.—Upon what theory, gentlemen, do you seek to introduce testimony of this character at this time?

Mr. McBEE.—If the Court please, the defendant here denies that he received any injury whatever at the Coeur d'Alene Lumber Company's mill, and they are contending that he was injured somewhere else.

The COURT.—The witness has answered the question that he knew of his receiving no injury while he was with him. Now, you ask whether he com-

(Testimony of John Bennett.)

plained of having been injured. Why isn't that hearsay, at this state of the case at least?

Mr. McBEE.—We have asked for damage for suffering prior to the amputation, and for the loss of the leg, and this witness worked with him after he had worked at the Coeur d'Alene Lumber Company, and was with him daily, and we want to show all his acts and declarations, what they were as affecting the element of damage.

The COURT.—You may show what his acts were; I think though, at this stage of the suit, his declarations would be incompetent.

Mr. MORGAN.—We will withdraw the question, if your Honor please.

The COURT.—It is possible that in rebuttal, if the defense should assume a certain position, such testimony might become competent.

Mr. MORGAN.—Did you notice, at any time while you were working with Goodwin, that he was lame, or that he doctored any injury that he had?

A. Yes, sir.

Mr. McFARLAND.—I object to that, if your Honor please, as leading and suggestive.

The COURT.—The exact form of the question I didn't hear.

(Question read by stenographer.)

The COURT.—The objection is overruled.

Mr. McFARLAND.—An exception.

A. (Repeated by witness.) Yes, sir.

Mr. MORGAN.—Q. State what he did, if you know?

(Testimony of John Bennett.)

A. Well, during the time he was with me he used to complain of his leg hurting him—

Mr McFARLAND.—I ask to have his answer—

A. (Continued.)—complained of his leg paining him, and doctored his leg nights, bathed his leg with turpentine and liniment and such stuff as that—complained continually during the time he was with me.

The COURT.—Witness, don't state what he said; that may be stricken out.

Mr. MORGAN.—Was he lame?

A. Partly, at times he was limping.

Q. During the time you worked with him, did he receive any injury, to your knowledge?

A. Not to my knowledge.

Mr. MORGAN.—That is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. What is your business, Mr. Bennett?

A. Deliveryman for the Colquhoun Hardware Company.

Q. How long have you lived in Coeur d'Alene?

A. Three years.

Q. What business did you follow before you came to Coeur d'Alene? A. Cook.

Q. You say you have known George Goodwin about five years? A. Yes, sir.

Q. First met him in Wisconsin?

A. Washburn, Wisconsin.

Q. Now you had a contract with the Bunker Hill & Sullivan mine in July and August, 1907, did you?

(Testimony of John Bennett.)

A. Not exactly a contract, sir; I had a job through their foreman, building a dam, no contract drawn.

Q. And George Goodwin went up from Coeur d'Alene with you there?

A. I was authorized to bring a man with me, and I took him as my helper.

Q. You found him working for the B. R. Lewis Lumber Company at that time? A. Yes, sir.

Q. And he quit work to go up with you?

A. Yes, sir.

Q. And he went up and worked on this work for about two months? A. Yes, sir.

Q. He worked pretty steadily, did he?

A. Yes, sir.

Q. Didn't miss a day except Sundays, did he?

A. Not to my knowledge.

Q. What particular work did he do?

A. He helped me to fall the timber and line it ready for the hewers.

Q. What do you mean by falling the timber?

A. Chopping the trees down, sawing them down.

Q. And lining them for the hewers?

A. Yes, sir.

Q. What do you mean by lining them?

A. Peeling the bark off and striking a line with the chalk line.

Q. What tools did he use during this time?

A. He used an axe and a cross-cut saw.

Q. He worked at one end and you at the other end? A. Yes, sir.

(Testimony of John Bennett.)

Q. How many days did he work with a cross-cut saw?

A. I don't remember how many days; we probably didn't use it only a few minutes at a time any day.

Q. You say he put liniment on his leg?

A. Yes, sir.

Q. Did this occur during the day or just at night?

A. It occurred during the night.

Q. Do you know where he went after he got through working for you?

A. We went to Coeur d'Alene together, and from there, I believe, he went to St. Maries.

Q. Do you know how long he remained at Coeur d'Alene? A. I do not, exactly.

Q. You didn't go back on this work yourself, did you? A. No, sir.

Q. You remained at Coeur d'Alene?

A. Yes, sir.

[Testimony of George Darrah, for the Plaintiff.]

Witness was excused, whereupon GEORGE DARRAH was called, sworn, and testified on behalf of plaintiff as follows:

Direct Examination.

(By Mr. MORGAN.)

Q. Mr. Darrah, you may state to the jury your name? A. George Darrah.

Q. Where do you reside?

A. Coeur d'Alene.

Q. How long have you reside there?

(Testimony of George Darrah.)

A. It is about two years—it will be two years the last of June.

Q. Do you know the plaintiff in this case, Mr. George Goodwin? A. Yes, sir.

Q. And the defendant company, the Coeur d'Alene Lumber Company?

A. I have heard of them; I never worked for them, but I know of them.

Q. How long have you known Mr. Goodwin?

A. Well, for about five years—ever since he came to this country.

Q. What do you mean by ever since he came to the country?

A. It is about five years since he came here; I was acquainted with him shortly after he came.

Q. Where? A. In Washburn, Wisconsin.

Q. Did you work with him during the summer of 1907? A. Yes, sir.

Q. State about when and where?

A. Well, first I worked with him at St. Joe.

Q. What were you doing there?

A. He was the engineer on the donkey-engine and I was firing.

Q. What sort of an engine?

A. Donkey-engine, for pulling timbers off the mountains with a long cable.

Q. Please explain in a few words to the jury what a donkey-engine is.

A. A donkey-engine is for the purpose of pulling logs from the mountains where they can't get with horses, with a long cable.

(Testimony of George Darrah.)

Q. Is it a stationary engine? A. Yes, sir.

Q. Then where did you go with Mr. Goodwin, if any place?

A. We came to Coeur d'Alene then, and from there to Rose Lake.

Q. State what you did there.

A. Worked in a logging camp there.

Q. How long were you there?

A. About a month.

Q. Where did you go from there?

A. From there to Coeur d'Alene again, and from there to St. Maries.

Q. How long were you there, and state what you did.

A. We worked together there about eight or ten days; we were moving a building there, a saloon.

Q. For whom? A. For Lee & Demars.

Q. State what you did then.

A. I went to work with the carpenters after that.

Q. Where did Goodwin go?

A. He worked in Stickney's camp.

Q. Do you know how long?

A. About seven or eight days, I think it was.

Q. Then where did *he to*?

A. He went from there to the hospital.

Q. During the time you worked with him, Mr. Darrah, did you know of any injury he received?

A. No, sir; I didn't know of any; I know he didn't receive any to my knowledge.

Q. Do you know, during the time you worked with

(Testimony of George Darrah.)

him, whether or not there was anything the matter with his right leg?

A. Yes, sir; I knew it was hurting him.

Q. How did you know that ?

A. He was telling me about it paining him.

Mr. McFARLAND.—I ask to have that answer stricken out.

Mr. McBEE.—No objection.

The COURT.—Very well.

Mr. McBEE.—Q. State what he did during the time you were with him, with reference to the leg.

A. He was rubbing liniment onto it.

Q. Did you ever see the wound?

A. No, sir; I never examined it.

Q. What did you see, if anything?

A. I just saw him working with it, and rubbing it with liniment.

Q. When?

A. At night-time, when he would be going to bed.

Q. Well, did this rubbing and care continue?

A. Yes, sir; every night.

Q. For how long?

A. During the time we were rooming together.

Q. State again, if you please, just how long that was. A. Well, at St. Maries, about two weeks.

Q. And about a week at St. Joe?

A. Yes, or a little better than a week at St. Joe.

Q. And also at Rose Lake?

A. About a month there at Rose Lake.

Q. Did he favor this leg?

(Testimony of George Darrah.)

Mr. McFARLAND.—I object to that as leading and suggestive, if your Honor please.

Mr. MORGAN.—Q. What were his actions when he walked?

A. He always had a little limp in his walk.

Q. During all of this time? A. Yes, sir.

Q. Do you know, Mr. Darrah, whether or not the condition of his leg improved or got worse during the time you worked with him?

Mr. McFARLAND.—I object to that, if your Honor please, for the reason that the witness has shown that he is not competent to testify.

The COURT.—Sustained.

Mr. McBEE.—I don't think. if your Honor please, that he has shown that he is not competent.

The COURT.—He has stated that all he saw was him rubbing liniment on it; he certainly couldn't say what the condition of the leg was if he never saw it.

Mr. MORGAN.—Q. Mr. Darrah, how did he act during that time?

Mr. McFARLAND.—I object to that as not material, incompetent, too general.

The COURT.—Perhaps the witness will understand. The objection is overruled. To which ruling of the Court the defendant then and there duly excepted.

Mr. MORGAN.—With reference to this leg.

A. He always favored it more or less during this time; it seemed to be getting worse all the time.

Q. Did his care of it increase or diminish?

A. Increased.

(Testimony of George Darrah.)

Mr. McFARLAND.—I object to that as leading and suggestive, and calling for the conclusion of this witness, and not based upon any facts.

The COURT.—He may answer. To which ruling of the Court the defendant then and there duly excepted.

A. It always increased.

Mr. MORGAN.—Q. Mr. Darrah, what were Mr. Goodwin's habits, if you know, during the time you have known him?

Mr. McFARLAND.—I object to that as immaterial, if the Court please.

The COURT.—What is the purpose?

Mr. MORGAN.—The purpose is, to show the jury that this injury was not caused by any other, anything outside of the original cause.

The COURT.—He has stated that so far as he knows he suffered no injury or accident while he knew him. The objection will be sustained.

Mr. MORGAN.—Q. What were his habits as to industry and sobriety?

Mr. McFARLAND.—I object to that as immaterial and irrelevant, and not responsive to the issues, and calling for the conclusion of this witness also, if the Court please.

The COURT.—The objection will be overruled.

A. So far as I know he was moral.

Mr. MORGAN.—Q. And as to industry?

A. His industry was good.

(Testimony of George Darrah.)

Cross-examination.

(By Mr. McFARLAND.)

Q. Mr. Darrah, what business are you engaged in at the present time?

A. I am working in LaCross in the power-house at the planing-mill at LaCross.

Q. You are working for the Big Four?

A. No—Stack & Gibbs.

Q. How long have you been working for them?

A. I started there the 17th of April, and have been there ever since.

Q. What was your business at this time you were with George Goodwin? A. Common laborer.

Q. You worked at any job you could get?

A. Yes, sir, any job I could get to do.

Q. Where did you join him or he join you?

A. In Coeur d'Alene.

Q. Was anyone else with you?

A. No, sir; just the two of us.

Q. When did he and you commence working together?

A. The last week in August, two years ago; it will be two years this August coming.

Q. And you met him in Coeur d'Alene, and went from there to where? A. St. Joe, first.

Q. And finally wound up at Rose Lake, did you?

A. No, sir; we separated at St. Maries.

Q. That was when he went out in the logging camp? A. Yes, sir.

Q. Where did you go?

A. I stayed in St. Maries for awhile.

(Testimony of George Darrah.)

Q. Did you see him when he started for the hospital? A. Yes, sir.

Q. You say that he never showed you his leg, the wound?

A. No, sir; I never examined his leg, no, sir.

Q. Did he appear to walk lame all the time?

A. Yes, sir.

Q. Was his limp very noticeable?

A. Oh, not so awfully bad, but it was quite noticeable, you could tell he was lame.

Q. He didn't lose any time from his work, did he?

A. No, sir, not up until he went to the hospital.

(Witness excused.)

Mr. McBEE.—If the Court please, unless there is some objection, these last two witnesses may be excused and allowed to go home.

Mr. McFARLAND.—I don't think we will need them.

The COURT.—They may be excused then, these two witnesses.

Mr. McFARLAND.—Yes.

The COURT.—Very well.

[Testimony of L. W. Bellis, for the Plaintiff.]

Thereupon L. W. BELLIS was produced as a witness on behalf of the plaintiff and was sworn and testified as follows:

Direct Examination.

(By Mr. McBEE.)

Q. You may state your name.

A. L. W. Bellis.

(Testimony of L. W. Bellis.)

Q. Where do you reside, Mr. Bellis?

A. Coeur d'Alene City.

Q. What is your occupation?

A. Well, I follow working in the mill most of the time.

Q. Do you know George Goodwin, the plaintiff?

A. I haven't known him, that is, to know his name, till about three weeks ago; I remember seeing him about two years ago.

Q. Where? A. Coeur d'Alene.

Q. Where?

A. The first time I saw him he was working on the pond for the Coeur d'Alene Lumber Company, down on the boom; and the next time I saw him he was working on the deck, that is, at the end of the chain that takes up the logs; and then the next time I saw him he was working as a tailer, behind the edger.

Q. In what mill, and where?

A. In the Coeur d'Alene Lumber Company's mill.

Q. At Cour d'Alene, Idaho? A. Yes, sir.

Q. About when was that?

A. That was a year ago this summer, some time.

Q. A year ago this summer?

A. A year ago last summer.

Q. Coming two years now?

A. Two years ago now.

Q. What were you doing about the mill when you saw him at work tailing the edger?

A. Well, I was in the filing-room.

Q. Where was the filing-room, with reference to the edger?

(Testimony of L. W. Bellis.)

A. The filing-room is on the north side of the mill, and a little bit west of the edger.

Q. On a level?

A. Yes, sir, on a level with the edger floor, on the same floor.

Q. And you saw Goodwin at the edger table?

A. Yes, sir.

Q. Now, did you see anything to indicate that he received any injury that day? A. Yes, sir.

Q. Just relate what you saw, with reference to Mr. Goodwin, in that place, and at that time.

A. Now, when I saw him the first time—I saw him after he was hurt—I was at that time sitting on a bench with Frank Hill in the filing-room, and we heard someone holler, and we saw the trouble riders make a motion to the sawyers and pointing their fingers down toward the lower end of the mill.

Q. Where were they pointing, with reference to where the edger was?

A. In the direction of where this man was working. And Frank Hill and I got up and walked to the door, and Frank Hill says—

Mr. McFARLAND.—I object to what Frank Hill said.

Mr. McBEE.—Tell what you say. Don't tell what Frank Hill said.

A. When we got there to the door—you see this man was standing kind of bent over and had his hand on his leg.

Q. Which man?

A. That man there with the crutch.

(Testimony of L. W. Bellis.)

Q. Goodwin?

A. Goodwin, or Gooding—and he straightened up and he picked up a piece of edging and he went down around in under the conveyor, and out through the east door, and I saw him again standing there by the stairway, and at that time there was quite a crowd around him, that is, the lath sawyers and lath pickers was standing around him—I should think there was four or five of them standing around this man as he stood there at the head of the stairs.

Q. What was he doing—in what position was he?

A. Well, he had hold of the stairway, and he had his hand on his leg; and the man—there was one man stood kind of sideways—I can't tell unless I had somebody here to show exactly how he was standing, I don't know—

Q. What was the man doing—

A. They was feeling of his leg.

Q. With reference to Goodwin?

Mr. McFARLAND.—I object to that as immaterial.

The COURT.—I can't see how it is material, gentlemen. Sustained.

Mr. McBEE.—What was Goodwin doing?

A. He was standing there letting them feel of his leg.

Mr. McFARLAND.—Now, I ask to have that stricken out, as not responsive.

The COURT.—I can't see that it is important either way.

Mr. McFARLAND.—I withdraw my motion.

(Testimony of L. W. Bellis.)

Mr. McBEE.—Q. When did you next see Goodwin after that?

A. I never saw that man until about three weeks ago.

Q. Did you at that time know who he was?

A. I didn't know what his name was; he told me his name here about three weeks ago.

Q. What experience had you had about that mill before that time?

A. Well, I worked around that mill, I guess, about as much as any man there is in Coeur d'Alene.

Q. How much is that?

A. Well, I was a filer there seven years ago, from the 28th day of June till the mill closed down that winter.

Q. Are you familiar with the manner in which that mill was operated with reference to the edger, at that time? A. Yes, sir.

Q. Are you familiar with the station in which the edgerman worked, or the man who was tailing the edger worked? A. Yes, sir.

Q. Describe that to the jury.

A. Well, at that time—that was seven years ago?

Q. No, I am talking about the time Mr. Goodwin was injured. A. Yes, sir.

Q. Now, describe it as it was at that time.

A. Well, at the time that he was hurt, he was standing in the pit taking the edgings from the lumber as the lumber passed by him. The lumber was put through the edger and taken two edgings on each board; the edgings was taken off of these boards, and

(Testimony of L. W. Bellis.)

as the boards would pass by him he would grab a couple of edgings here and slide them off on that side, and they would drop down on the chains that would taken them into the slashers; and when a board would come on this side, he would grab a couple of edgings and shove them off, and then when the slabs would come through, he would take them and shove them off.

Q. What kind of a place did he have to stand in?

A. You mean the size and depth and so on?

Q. Yes.

A. I should think it was about two feet and a half deep, the pit, and the size of the pit would be in the neighborhood of three feet by maybe four feet the other way.

Q. What kind of walls to this pit—what kind of walls did the pit have, sides? Were they perpendicular or slanting, or otherwise?

A. The pit was square up with the roller behind.

Q. Were the sides of the pit straight up and down, or slanting? A. It wasn't slanting.

Q. Straight up and down? A. Yes.

Q. What was there behind the pit, away from the edger? A. That would be behind him?

Q. Yes.

A. There was a roller there, and then there was a cross-piece that went up by the side of the roller—I think it was in the neighborhood of as wide as my hand, maybe a little wider—come almost to the top of the roller; it was there for protection, to keep a person's clothing from winding around the roller.

Q. In front and toward the edger, was there?

(Testimony of L. W. Bellis.)

A. There was *there* rolls in front of him, and one behind him, that is, besides the edger rollers.

Q. What were these rolls on—what were they supported by? A. They was on a table.

Q. What would you call that table?

A. Tailing-table, behind the edger.

Q. What was the length of that table? Rather, I want the length between the edger-saws and the beginning of the pit? That is, how far was it from the pit in which the tailer stood to the edger-saws?

A. How far?

Q. Yes.

A. If my recollection serves me right, it was sixteen feet; it may be eighteen feet, but not any more than that.

Q. Now, explain how the boards come through when they go into the edger until they pass the pit.

A. I didn't understand the question.

(Question read by stenographer.)

A. How they go through the edger? Well, the edger has rigid rollers on the bottom and heavy rollers on top. The rigid rollers are run by a belt on the south side of the edger, and are continually rolling, while the upper rollers only roll when there is a board between the rollers and the lower rollers; they are a heavy roller for the purpose of holding the board down onto the rigid rollers, so as to compel that board to go through that edger.

Q. Is it possible for a man by force to stop a board when it is on its way through the edger?

(Testimony of L. W. Bellis.)

Mr. McFARLAND.—I object to that, if your Honor please, because the witness has now shown himself qualified.

The COURT.—Sustained.

Mr. McBEE.—Do you know whether it is possible to do so?

The COURT.—Just answer yes or no.

A. Yes, sir.

Mr. McBEE.—Q. Is it possible?

A. No, sir.

Q. Why?

A. Because they can't stop it after it starts into that edger until it has been released by the back rollers.

Q. Do you know whether or not, at that time, that was a safe place to work?

Mr. McFARLAND.—I object to that if your Honor please, as calling for an opinion and conclusion of this witness, and leading and suggestive, and that the witness has not shown himself qualified or competent to testify on the subject.

The COURT.—Sustained. This witness has shown nothing more than that he was familiar with filing, whatever that may mean, in that business.

Mr. McBEE.—Q. Are you familiar with sawmills? A. Yes, sir.

Q. With the general working and operation of sawmills? A. Yes, sir.

Q. What experience have you had around them?

A. I have worked in mills for the last twenty years.

(Testimony of L. W. Bellis.)

Q. What kind of mills have you worked in?

A. Most of my work has been filing.

The COURT.—What kind of mills, he asked you.

Mr. McBEE.—What kind of mills?

A. Band saws and rotaries.

Q. Have you, during that time, had occasion to familiarize yourself with the general workings of edgers? A. Yes, sir.

Q. Were you at that time familiar with this particular edger and mill and the pit in which this defendant stood at the time you saw him working there?

A. Yes, sir.

Mr. McBEE.—I now renew the question.

The COURT.—Ask him the question.

Mr. McBEE.—Q. Do you know whether or not, at that time, that was a safe place in which to work?

Mr. McFARLAND.—I object to that, if the Court please, as incompetent, and the witness hasn't qualified himself to answer, hasn't shown himself competent, and the question calls simply for the opinion of this witness, not based upon any facts.

The COURT.—I am going to sustain the objection to this particular question, gentlemen, because I don't think it is a proper question to ask the witness. What difference could it make whether it was a safe place or not? I suppose that any place about a sawmill, that is, in proximity to dangerous machinery, would, in a sense, be dangerous. Now, if you are trying to get at the question whether or not the mill was properly constructed, that is a different question, but certain employments are regarded as dangerous.

(Testimony of L. W. Bellis.)

Underground mining is considered dangerous employment; working about heavy machinery in rapid motion is considered dangerous employment. Suppose this witness should answer yes, that would mean nothing; it wouldn't bear upon the question whether or not the defendant was negligent.

Mr. McBEE.—My understanding of the rule was that where a servant is put to work in a dangerous place, and that servant is inexperienced, it is the duty of the defendant to warn him of the danger. We have already shown that the servant was inexperienced, that he had never before worked in a sawmill—he had worked down below the mill, in the water, for a short time, getting logs up to it, and now he is placed to work in a sawmill.

The COURT.—If that is your theory, the jury are just as able to reach the conclusion as this witness is. It is obvious that there are dangers accompanying this sort of work; that would go without saying; that wouldn't be disputed probably. You will understand that the Court is not excluding, or not intimating that it will exclude, the testimony of this witness relative to the general question as to whether or not the conditions under which this man was working were proper, that is, as to whether or not the conditions were such as should have been reasonably provided by a prudent employer.

Mr. McBEE.—Very well, I will take an exception to your Honor's ruling, and ask another question or two perhaps along the same line.

The COURT.—Very well.

(Testimony of L. W. Bellis.)

Mr. McBEE.—Q. Mr. Bellis, you may state whether or not you know that there was any danger to one working in this place where the defendant was working, as to being caught by the boards that came through from the edger?

Mr. McFARLAND.—If the Court please, I object to that as improper, inconpetent, and immaterial, and for the reason that the witness hasn't shown himself competent to testify upon that subject, and for the further reason that it calls for an opinion or conclusion of this witness, not based upon any facts; it just simply asks him for his opinion, and I presume if it was to be ascertained how he arrived at that opinion we would be compelled to do that on cross-examination. I should think the correct rule would be for the witness to first qualify himself.

The COURT.—It occurs to me, Mr. McFarland, that anyone could see that there was some danger there, and in order to save time, I am going to permit him to answer. The answer to his question must be obvious. You may answer the question.

To which ruling of the Court defendant then and there duly excepted.

(Question read by stenographer.)

A. If there is any danger by a board coming through—is that it?

Q. Yes.

A. There would be danger, and there is danger of a man being caught, providing that the board hasn't been released by the rollers on the edger, the back

(Testimony of L. W. Bellis.)

rollers, that is, providing that the board was too long to be released by the time it crossed over this pit.

Q. State whether or not, in your opinion, at this time, this mill was properly constructed so as to avoid injury at this place?

Mr. McFARLAND.—If the Court please, I object to that as improper, immaterial, incompetent, and for the reason that it calls for the opinion and conclusion of this witness, and that the witness hasn't shown himself competent to testify upon the subject, that he hasn't shown that he has had any experience in the construction of sawmills or mills of this kind, or, in fact, has not given any testimony that shows any qualification to testify.

The COURT.—The objection will be sustained, upon the ground of the incompetency of the witness, so far as the present showing goes.

Mr. McBEE.—I will ask, Mr. Bellis, if you know how a mill ought to be constructed in regard to this pit for the person who is tailing the edger, so as to avoid injury to the workman?

Mr. McFARLAND.—I object to that as improper and incompetent.

The COURT.—He may answer yes or no.

A. Yes, sir.

Mr. McBEE.—Was this mill constructed as it should be, in that regard?

Mr. McFARLAND.—I object, I renew my objection. This witness has not shown himself competent or qualified to testify. The question is incompetent and immaterial, and calls for the mere conclusion or

(Testimony of L. W. Bellis.)

opinion of this witness, not based upon any facts adduced in the evidence showing his qualification or competency to testify on the subject.

The COURT.—The objection will be sustained.

Mr. McBEE.—Q. State in what respect, if at all, this mill was not properly constructed or arranged so as to avoid danger of injury to a workman tailing the edger, in the position where the plaintiff was employed at the time you saw him?

Mr. McFARLAND.—I make the same objection, if the Court please.

The COURT.—Overruled. To which ruling of the Court the defendant then and there duly excepted.

A. The pit was too close to the edger.

Mr. McBEE.—Why? Explain to the jury why that would make any difference.

A. If the pit had been ten feet, or twenty feet, further away from the edger, it would avoid the danger of putting long planks, or anything of that kind, through that edger, that was liable to catch him.

Q. How far away from the edger should this pit be? How far away from the edger should a pit be?

Mr. McFARLAND.—If the Court please, I object upon the ground that the witness hasn't shown himself competent to testify.

The COURT.—Overruled. Answer the question.

A. How far *had it should ought* to be?

Mr. McBEE.—Yes.

A. Well, it ought to be at least ten or twelve feet further away from that edger to avoid danger; and

(Testimony of L. W. Bellis.)

they should have the back side of where he stood with an incline, the same as they have got it now, to avoid the dangers.

Q. Why should an incline— how would that avoid danger?

A. Well, when a plank is going through the edger—

The COURT.—The latter part of that answer may be stricken out, that is, the part of the answer which relates to the present condition of the machinery there, is stricken out, and the jury will not pay any attention to that. There are certain reasons, gentlemen of the jury, why such testimony is not admissible, and the Court advises you that you are not to be influenced in any way by reason of the fact that this witness has stated that some change as been made there in the arrangement. I can't explain to you fully why you shouldn't consider that, but you can take my statement of the law that you should not consider it.

(Last question and answer read by stenographer.)

A. (Continuing.) An incline, if a plank caught a man, and he was on the incline, or close to the incline, it would shove him up over the roller and avoid him getting caught on the sharp corner.

Mr. McBEE.—That is all, I believe, your Honor.

At this time an adjournment was taken until ten o'clock, A. M. Friday, May 21, 1909.

Court met, pursuant to adjournment, at ten o'clock, A. M., Friday, May 21st, 1909, all parties

(Testimony of L. W. Bellis.)

being present, and the following proceedings were had, to wit:

Mr. McFARLAND.—If the Court please, I would like to finish the cross-examination of Mr. Goodwin before Mr. Bellis takes the stand again.

The COURT.—I think, gentlemen, you would better finish with this witness first.

L. W. BELLIS, recalled for cross-examination.

Cross-examination.

(By Mr. McFARLAND.)

Q. I believe you stated that you have worked more in the Coeur d'Alene Lumber Company's mill than any man in Coeur d'Alene.

A. Well, I have put in considerable time in that mill.

Q. When was the last work you did there?

A. The last work I did there was a year ago last summer; I was filing nights; I was on the night shift, doing the night filing.

Q. How many days or nights did you work at that work?

A. Well, I started in when the mill started up nights, and I worked up until harvest time, and then I came up into the Palouse country and went to work in the harvest over here to Garfield.

Q. How many nights did you work?

A. I should think it was in the neighborhood of four or five weeks.

Q. Was Mr. Salscheider there at that time?

A. Yes, sir.

Q. Will you swear that you didn't—will you

(Testimony of L. W. Bellis.)

swear that you worked more than three nights at that time?

A. No, sir, I would not swear to anything of the kind.

The COURT.—I don't think the witness understands.

Mr. McFARLAND.—Q. Will you swear that you worked more than three nights at that time?

A. Would I swear that I worked more than three nights?

Q. Yes. A. Yes, sir.

Q. Who was the filer at that sawmill?

A. Frank Hill.

Q. Where is Frank Hill now?

A. He is in Girard, B. C.

Q. British Columbia? A. Yes, sir.

Q. How long has he been away from Coeur d'Alene?

A. He went away from there about two or three weeks ago, three weeks ago, I think it was.

Q. He was the man who was in this filing-room with you at the time you claim this accident occurred to the plaintiff? A. Yes, sir.

Q. Now, how long did you work all together in that sawmill from January 1, 1907, up to the present time?

A. Well, I didn't work—I have worked only just at filing work; I don't think that I done any other work except the filing during that period from the time the mill started up nights until harvest time commenced.

(Testimony of L. W. Bellis.)

Q. Well, how much altogether did you work? I want to get the number of days, or the number of weeks that you worked altogether from January 1, 1907, up to the present time.

A. I am unable to give the amount of day, but when the mill started—

The COURT.—Well, state about how long, witness.

A. About how long?

The COURT.—Yes, get at the answer.

A. Well, this mill started up nights—

The COURT.—Can't you state about how many weeks or days it was?

A. It was about five weeks, I should think, about five weeks.

Mr. McFARLAND.—Q. When did you commence work there in 1907?

A. I am quite sure it was the last week in June; I am quite sure of it.

Q. The last week in June? A. Yes.

Q. Didn't you commence work there on July 2, 1907? A. July 2d?

Q. Yes, sir. A. It might have been.

Q. And you worked right straight along that number of weeks that you have testified to?

A. I worked up until August, about the 1st of August.

Q. Have you worked there since?

A. No, I haven't.

Q. Had you worked there in that year prior to the second day of July?

(Testimony of L. W. Bellis.)

The COURT.—He has already answered that twice, Mr. McFarland; he said no.

Mr. McFARLAND.—Had you worked there during the year 1906?

A. That would be three years ago, wouldn't it?

Q. Yes, you can figure it.

A. I filed nights, if that would be—it was the first year that Frank Hill had the contract for the filing—I filed nights for him up until harvest time that that mill run nights; I had the night filing.

Q. How long altogether?

A. I am unable to give just the amount of days, but to my best recollection it would be—well, I am not able to tell whether that mill started up in May to run nights or not, but I filed from the time that that mill started up nights until harvest time commenced.

Q. And you cannot say how long that was?

A. And I don't know whether it was in June or in May that the mill started.

Q. How have you worked in that mill any since August, 1907? A. No, I haven't.

Q. Isn't it a fact, Mr. Bellis, that in July, 1907, you were discharged by Mr. Frank Hill for incompetency?

Mr. McBEE.—I object to that as incompetent and immaterial.

The COURT.—Overruled.

A. I was not.

Mr. McFARLAND.—Q. Do you know how far it is from the edger—I mean the filing-room, to the pit at the edger-table?

(Testimony of L. W. Bellis.)

A. Well, it is in the neighborhood of about fifty feet. I should think fifty or sixty feet.

Q. That bench where you say you were sitting is in the southeast corner of the filing-room?

A. Yes, sir.

Q. That is the furtherest point in the room from the pit in the edger-table? A. Yes, sir.

Q. Now, how many doors are there in that room, or were there at that time, in that room?

A. There was three doors to that room.

Q. One of the doors was near the southeast corner of the room, wasn't it?

A. Yes, near the big band-saw.

Q. You couldn't look through that door from the bench and see the man at the edger-table, could you?

A. No, sir; and the other door is in the other corner—one door is in this corner (indicating) and one door in that corner (indicating) and one on the east side.

Q. The door that is in the northeast corner of the building is how far from that corner of the room?

A. Of the room I was sitting in?

Q. Yes, sir.

A. Well, the filing-room is about as large as this part of the courtroom from here to the railing, and that door there would be in the southeast corner of the room, and I was sitting over here in this corner, and it is about the size of this room.

Q. Don't you know it to be a fact that it is eighty-two feet from the pit in this edger-table to the south-

(Testimony of L. W. Bellis.)

east door of that filing-room, or the northeast door of the filing-room?

A. There is no northeast door to the filing-room.

Q. The door that is in the northeast corner, as you said.

A. That is in the southeast corner.

Q. Didn't you say that the door opposite to where this bench was was in the southeast corner of the room?

A. That door is in the southeast corner of the room, and this door is in the southwest corner of the room; the room stands just exactly as this courtroom does.

Q. Suppose you, witness, standing there represents the bench, where would be the nearest door to you?

A. This door right here would be the nearest door; both doors at that time was open, and the carriage was passing by both doors.

Q. I will ask you if it isn't a fact that from this door down here to the pit in the edger table is not eighty-two feet? A. About eighty feet.

Q. Eighty-two feet.

A. Eighty-two feet?

Q. Yes, sir.

A. It might be, but I don't think it is more than sixty or sixty-five feet.

Q. And were not those two doors twenty feet apart? A. That door and this one here?

Q. Yes, sir.

(Testimony of L. W. Bellis.)

A. Yes, sir, just about, I should think, in the neighborhood of twenty feet.

Q. And how far was this bench from the nearest door?

A. I should think it was in the neighborhood of thirty or thirty-five feet to the southwest door of that room.

Q. Was that mill running in full blast at that time—full force?

A. Yes, sir, it was—both band-saws.

Q. You don't hear very well, do you, Mr. Bellis?

A. No, my hearing is somewhat affected.

Q. Isn't it a fact that a man of good sound hearing could not hear a man scream or hollow from standing in this edger pit to where you were on that bench, while the mill is running in full force, or full blast?

A. Well, anyone hollering in the mill, you can hear it; it don't make any difference if it is running.

Q. Do you say you could hear a man yell or holler or scream if the mill was running in full force?

A. I could hear you if you was talking as loud as you are now.

Q. How much of the time have you worked in sawmills altogether from the 16th day of April, 1907, up to the present time?

A. The only time that I worked in a sawmill is for them people; the rest of the time I have been employed up here in the Palouse country.

Q. And that, you say, was about five weeks?

A. Yes, that was about five weeks.

(Testimony of L. W. Bellis.)

Q. What work have you been engaged in during the rest of that time? A. Since that time?

Q. Yes, sir.

A. I was working over here in the Palouse country in the harvest, that is, cutting wheat, for Mr. Thad Farhum, and then when the threshing commenced, I run the rake, that is, I think the rake belonged to a cousin of his.

Q. You worked as a common laborer, didn't you, in the harvest field?

A. I did during the cutting, but after that, when the threshing commenced, I run a separator.

Q. You claim to be a detective, don't you, Mr. Bellis? A. No, sir, I am not.

Q. Haven't you claimed to be a detective?

A. Well, at one time I had credentials—it was an association formed among the farmers to protect themselves against horse thieves.

Q. And you had a badge that you got from the association?

A. Yes, sir, I had a badge that I got from that association.

Q. And from April, 1907, up to last fall, didn't you run a wash house there in Coeur d'Alene?

A. My wife, she has been washing quite a little while.

Q. You go around and gather up clothes for her to wash, don't you?

A. Sometimes I deliver them for her, and sometimes I don't.

Q. When did you say you first became acquainted with George Goodwin?

(Testimony of L. W. Bellis.)

A. I never became really acquainted with him until—I seen him several times—until about three weeks ago.

Q. When was the first time you saw him?

A. He was working there on the pond down on the boom putting logs on the chain, for the Coeur d'Alene Lumber Company—that was the first time I discovered him.

Q. How long was that before this accident?

A. Well, that was before the mill started up nights—well, I don't know, I can't tell.

Q. You weren't working in the mill at the time George Goodwin was?

A. No, but I was down there quite often though; Frank Hill was a friend of mine, and I was kind of looking for the night filing, provided the mill started up nights.

Q. How many times had you seen George Goodwin prior to this accident?

A. Well, I saw him on the pond one day, when I was down there, and I think the next time I went there to the mill he was up on the deck working, and I don't know how long he did work there on the deck; and then the day I went down there to the mill to hire to Frank Hill for the night filing, I saw him working in this pit—they had changed men and put this man off the deck into the pit.

Q. That would be three times that you had seen him?

A. Well, I saw him quite a number of times on the deck—two or three times.

(Testimony of L. W. Bellis.)

Q. Had you ever had any conversation with him up to the time of this accident?

A. No, I don't know as I had.

Q. At the time of that accident did you go up and talk to him about this case?

A. I met the man on the street and went up and shook hands with him, and I told him—

Q. Never mind what you told him. How long after this accident was that?

A. That was about three weeks ago.

Q. You had never talked with him from the time of the accident until three weeks ago?

A. No, sir.

Q. Who did you first talk with about this case—I mean anyone connected with the case?

A. I talked with him about it.

Q. With George Goodwin? A. Yes.

Q. That was about three weeks ago?

A. Yes.

Q. Did you tell him what you knew about the case at that time?

A. I told him that I—

Q. I am not asking you what you told him. Did you tell him what you knew about the case at that time? A. Yes, sir.

Q. I am not asking you what you told him. Did you tell him what you knew about the case at that time? A. I told him that I was there—

Q. And that is the first time you ever did tell him?

A. Yes, sir. That was the first time I ever told him.

(Testimony of L. W. Bellis.)

Q. And the first time he ever spoke to you about you witnessing the accident?

A. He asked me if I was there.

Q. I said, was that the first time he ever spoke to you about you having witnessed this accident?

A. Yes, sir, that was the first time.

Q. Had you talked to Mr. Morgan or Mr. McBee about this case before you met and talked with George Goodwin about it?

A. No, sir, I never had.

Q. Did you ask to be subpoenaed as a witness in this case?

A. No, sir, I didn't; in fact, I told him I didn't want to be.

Q. I am not asking you what you told him. Why didn't you see him before that?

A. Because I didn't want to be subpoenaed on the case.

Q. You voluntarily went up and told him you was there and saw this accident?

A. Mr. Goodwin wanted me—

Q. I am asking what you did. Did you voluntarily go to him and tell him what you knew about this accident?

A. After he called for me, I did.

Q. He called for you first? A. Yes.

Q. Did you know at the time you had this conversation that he had brought a case against the company? A. No, I didn't.

Q. You knew, after having the conversation with him, that he had, didn't you? I am asking you if you didn't know, after having this conversation with

(Testimony of L. W. Bellis.)

him, that he had a case against the Coeur d'Alene Lumber Company?

A. Well, after I talked there, he told me he had brought a case.

Q. Did he tell you when that case was coming up for trial?

A. I don't remember whether he told me or not.

Q. You remember coming up into my office about a week or ten days ago? A. Yes, sir.

Q. Do you remember telling me at that time that you were sitting on the steps at the time this accident happened? A. On what steps?

Q. On the steps of the sawmill, going up into the sawmill?

A. No, sir, I never told you no such thing.

Q. Do you say that positively.

A. I say that positively.

Q. What did you come up to my office for that time, Mr. Bellis?

A. Well, I went up into Mr. McFarland's office in the first place—my—how I come to be up there, my little girl had a breaking out between the fingers, here on the back of her hand, and another place on her neck, and my wife wanted me to go and see the doctor, and I went up to Doctor Scallon's office, and his door was located—and Mr. McFarland's door was open, and Mr. McFarland has always been a friend of mine, and I stepped into his office, and a conversation took place, Mr. McFarland and I, in regard to this case.

(Testimony of L. W. Bellis.)

Q. You mentioned the case first to me, didn't you?

A. I mentioned it first to Mr. McFarland.

Q. Don't you remember that I asked you, when you said you was going to be a witness, and witnessed this accident, I asked you where you were at that time? Don't you remember that?

A. Where I was at that time? Yes, he asked me where I was at that time, and I told him I went up there to hire to Frank Hill, and that I was in the filing room at the time this took place, and Mr. McFarland says to me, and he says, "Bellis, you want to keep your nose out of this case," he says, "if you do get your nose into this, there will be trouble."

Q. Didn't I tell you that if you came into court and swore to anything that was not true you would get into trouble?

A. You didn't tell me any such thing—you know you didn't.

Q. Do you know what kind of lumber they were sawing at the time of this accident?

A. Well, I wouldn't want to testify positively.

Q. You don't know whether it was yellow pine or white pine? A. No, I don't.

Q. You don't know the length of the logs? I asked you, do you know the length of the logs?

A. That they had on the carriage at that time?

Q. That they were sawing at that time.

A. Do you mean that they was sawing on that day, or the logs that was on the carriage?

Q. The logs they were sawing at the time of this accident.

(Testimony of L. W. Bellis.)

A. I couldn't swear positive what the length of the log was.

Q. Now, Mr. Bellis, do you know how wide this edger in that sawmill was at that time?

A. How wide the saws was?

Q. The edger.

A. It was a large double edger, and there was two men was putting—

Mr. McFARLAND.—I ask to have the answer stricken out as not responsive, and I ask that the witness be required to answer my question.

The COURT.—Read the question to him.

(Question read by stenographer.)

A. The edger was either five or six feet wide; it is a double edger.

Q. And the edger-table must necessarily be as wide as the edger? A. Yes, sir, it is.

Redirect Examination.

(By Mr. McBEE.)

Q. I believe you sad that at the time of this accident you were not employed in the mill?

A. No, sir, I was not.

Q. You were employed there afterwards?

A. Yes.

Q. Were you employed by the defendant mill company or by someone else?

A. I was employed by Frank Hill, the head filer.

Q. He had a contract for the filing?

A. He had a contract, day and night shift both, and hired helpers and I worked for him, and drawed my pay from him.

(Testimony of L. W. Bellis.)

Q. In regard to the length of the logs in the mill that they were sawing that day, or any day, do you know whether or not all the logs sawed on one day would be of the same length?

A. No, they wouldn't be all the same length.

Mr. McFARLAND.—I object to that, because the witness hasn't shown himself qualified; that is something he couldn't testify to unless he was present and saw it.

The COURT.—You asked him—however, the objection is overruled. You are asking about what was customary in that mill.

Mr. McBEE.—State how it was in that mill.

A. Now, the north side of the mill is the big band-saw; that side of the mill takes all of the long logs, and the short logs is put over on the south side and goes through the little band-saw.

Q. As I understand you, on the same day it is their custom to saw different lengths of logs?

A. Now—

The COURT.—Now, Mr. Bellis, can't you answer a question directly? Read the question to him, Mr. Reporter.

(Question read by stenographer.)

A. Sometimes they saw different lengths of logs on the same day, and sometimes they saw, you might say, all one kind of logs, that is, with that saw on the north side of the mill. They sort the logs sometimes in the pond, and pick out the fir and tamarack and saw it into dimension stuff, big timbers, and that was sawed on the big band-saw.

(Testimony of L. W. Bellis.)

Recross-examination.

(By Mr. McFARLAND.)

Q. Just one question. I believe you stated yesterday that the boxing in the edger pit should be on the incline, or slanting. Did you so state?

A. Yes, sir.

Q. That is, you meant that back of where the edgerman stands, the side should be slanting like this—this rule, or something like that?

The WITNESS.—Will the Court allow me to go there and explain it to him?

The COURT.—Yes.

A. Now, there is a board behind you—

Q. I don't care for that.

The COURT.—The Court will require you to answer the question.

A. The incline goes from about the center of this pit up to, you might say, an inch from the top of that ruler, and it might not be over half an inch from the top of that ruler, and it is about that pitch, about one-half pitch.

Mr. McFARLAND.—You may take the stand. On the day of this accident was not the side of this edger pit back of where the man who tailed the edger stood slanting or on the incline, just as you have described?

A. On the day of that accident?

Q. Yes, sir. A. No, sir, it was not.

Q. You swear to that positively?

(Testimony of George Goodwin.)

A. I swear to that positively, and I can tell you when it was changed, and who changed it.

Q. You can tell that? A. I can.

[Testimony of George Goodwin, for the Plaintiff (Recalled).]

Said witness was excused and thereupon GEORGE GOODWIN was recalled for further cross-examination and testified as follows:

(By Mr. McFARLAND.)

Q. Mr. Goodwin, you have knowledge of the character and kind of timbers that are sawed in sawmills in this country, haven't you?

A. Well, I got a little.

Q. You know white pine from yellow pine, and spruce, fir, or cedar?

A. Yes, I guess I would.

Q. Did you know the difference between those timbers at the time you were working there in the Coeur d'Alene Lumber Company's mill?

A. I couldn't exactly state what kind. It was a two-inch plank—you don't know the quality; a man working where I was wouldn't take much notice of the quality of lumber.

Q. Couldn't you tell whether you were sawing white pine or yellow pine?

A. I could if I stopped to look at it.

Q. Can you say what kind of timber was being sawed on that day, or at the time of this accident?

A. No, sir, I couldn't; to the best of my opinion it was yellow pine.

(Testimony of George Goodwin.)

Q. Do you know the length of the logs they were sawing at the time of this accident?

A. I believe that was an eighteen-foot plank.

Q. You are not sure it was that long, are you?

A. Not quite, I am not sure about it; but it must have been—if it was a shorter one it wouldn't have hurt me.

Q. You say you never measured or had no idea at that time what the length of the edger-table was, have you?

A. I reckon it was about sixteen feet length.

Q. Do you know that it was only sixteen feet long? A. About, at that time.

Q. Would you swear, assuming that this is where the edger is—this book represents the edger—would you swear — and this the edger-table — would you swear that the distance from the edger to this end of the edger-table in front of which you stood was not eighteen feet?

A. I swear to the best of my opinion it was only sixteen feet at that time.

Q. And you never measured it?

A. No, sir—but the length of the boards that come out.

Redirect Examination.

(By Mr. McBEE.)

Q. You don't know the length positively, do you?

A. Not positively.

(Witness excused.)

Mr. McBEE.—If the Court please, that is the only witness we have now except the Doctor, who will be

here on the morning train, at eleven o'clock, and it will take us but a few minutes to finish with him.

The COURT.—He knows nothing about the accident, that is, I mean directly?

Mr. McBEE.—No, he knows nothing about the accident.

The COURT.—Can't you proceed, gentlemen, with the understanding that he is to be put on later? The Court doesn't like to delay the trial of the case.

Mr. McBEE.—His testimony will be of this character: Simply corroborating Goodwin as to the time of his coming there, and then as to conditions which he found, of course, and what he did.

The COURT.—In other words, he will testify as a physician simply?

Mr. McBEE.—Yes.

Mr. McFARLAND.—Your Honor, I don't see how I can proceed until all their testimony is in, because I have a matter to call your Honor's attention to.

The COURT.—I infer from what you say that you desire to submit some motion. This testimony that they tender is simply medical testimony. Assuming that that is the case, couldn't we proceed anyway? Assuming that they close as to everything except this one witness, who will testify merely as a physician, couldn't we proceed?

Mr. McFARLAND.—I will ask that the jury be excused.

The COURT.—Very well, the jury may retire from the room; remain, however, out in the hall, there.

(Jury retires.)

[Motion for a Judgment of Nonsuit, etc.]

Mr. McFARLAND.—The plaintiff having closed and rested his case, now comes the defendant and moves the Court that a judgment of nonsuit be entered in this action against plaintiff and in favor of the defendant, for the reason that plaintiff, upon the trial of this action, has failed to prove a sufficient case for the jury, in this, namely:

First. Plaintiff has failed to prove that the work directed by defendant for him to do was dangerous work, or that the place where plaintiff was directed to stand while performing said work was not large enough to permit plaintiff, or any other laborer, to stand therein and work and labor, with safety to himself.

Second. Plaintiff has failed to prove that the work required of him by defendant was too great for one person to perform, or was fraught with, or attended with, grave danger to plaintiff, or other danger, or to any person engaged in the operation of such work.

Third. Plaintiff has failed to prove that at the time he received the alleged injury he was ignorant of the danger attendant upon the performance of said labor, if there was any, or was ignorant of or did not know or appreciate the danger, if any, in the performance of said work.

Fourth. Plaintiff has failed to prove that at the time of the alleged injury, or prior thereto, defendant knew that the place where plaintiff worked was

dangerous or unsafe, or could, by the exercise of ordinary care, have become cognizant thereof.

Fifth. Plaintiff has failed to prove that more work was required of him than he could safely do, or than could be done by one laborer, or that it required two men to perform the work plaintiff was directed by defendant to perform.

Sixth. Plaintiff has failed to prove that he was injured by any negligence or carelessness on the part of the defendant, and has failed to prove that in the performance of his said work of tailing the edger he used, due care and caution for the protection of himself, or to prevent injury from himself.

Seventh. Plaintiff has failed to prove that the amputation of his leg was necessarily occasioned or caused by reason of any injury he received on account of the negligence or carelessness of defendant.

Mr. McBEE.—That, Mr. McFarland, will not be argued at this time.

Mr. McFARLAND.—Not at this time, I take it, your Honor.

Eighth. The testimony shows that if the place or pit where plaintiff stood in tailing the edger was a dangerous or unsafe place to work in or at, plaintiff had, prior to receiving such injury, worked in such place for a sufficient length of time that by the exercise of ordinary care or caution he could have discovered the unsafe condition of said pit or place, and he is therefore assumed to have known the same and to have assumed the risk at the time of the accident complained of.

Ninth. The testimony shows that if plaintiff received any injury while in the employ of defendant, it was upon account of his own negligence in standing upon one foot and bending over and down and by raising his knee to the level of the edger-table, where it could be struck by the board coming from the edger.

Now, if the Court please, I do not desire to make any extended argument upon this motion, I think the motion speaks for itself, and I think that the testimony is clearly in the mind of your Honor; and I do not believe that your Honor or anyone else can point to any act of negligence or carelessness on the part of the defendant, either in failing to provide the plaintiff with a safe place in which to work, or any act of omission or commission.

The plaintiff has testified that he doesn't know exactly the length of this table; he doesn't know the dimensions of this pit; he doesn't know for sure the lengths of these logs.

Mr. Bellis has testified that the table is about so long—he makes it, I think, about eighteen feet from the edger to the end of the table just in front of where the tailer stands. He says that he is not familiar with the dimensions of the edger pit; he testified that at the time of this accident the boxing or siding of the edger pit, back of the tailer, was not slanting; now he did not testify, and there is no testimony in this case to the effect that if it is not slanting it would be dangerous to anyone tailing the edger. There is no testimony to that effect whatever. How he testified that if a board is very long,

in coming through the edger, if the upper end of it is caught and held by the edger, if the other end gets to the end of the edger-table in front of the tailer, that it would have such force as to strike and probably hurt the tailer; now there is no testimony that this board was longer than the edger-table, counting from the place where the edger stood, or where it came out of the edger, to the end of the table. There is no testimony whatever of that.

Now, the testimony of Mr. Goodwin is to the effect that he had to stand in front of the center of this edger-table; that his duty was to take care of the edgings on either side; these boards would come on either side of him and he would remove the tailings or edgings, and the boards would pass onto this roll back of him and be brought down and carried to another place. Now, he testified that while he was so working, a quantity of edging came out; he said they began to pile up, and he turned around—mind you, they were on this table, because that was the place he must clear them from—he said that he turned around and he leaned over this way (indicating). Now, mind you, he said that this edger-table is two feet six inches high—he said about two feet and a half—or did Mr. Bellis—that means from the bottom of the floor to the surface of the edger-table—he stood and bent over this way (indicating), and held one knee up to about that distance—so as to make it two feet and a half that he held this knee up. And I say this, that it is impossible for a man, even if the tailings were on the table, or if they were on the side down here on these chains, to have done

that, and if he did such a thing, it was negligence on his part, and was not negligence on the part of the company.

Now, another thing; he tells your Honor and the jury that this board struck him on this side of this knee (indicating), just above the knee-joint. Now, in order for the board to have done that, he must have turned his back, and if he bent his knee in turning around, it was impossible for the board to have struck him there, and I say that if he received any injury at all, it was on account of his own act, and certainly not on account of any carelessness on the part of the defendant.

Now, your Honor will recall the allegations of the complaint in this case. The complaint alleges that at that time the plaintiff was performing two men's work; that the work that they set him to doing was more than one man could perform. There is absolutely no testimony here substantiating that allegation, or proving that fact. They also allege that this place was dangerous, because it was too small for a man to work in—too small for this defendant, or any other laborer, to work in. Now, there is no testimony of anyone, whether an expert on machinery or sawmills, or otherwise, that the dimensions of this edger pit were too small. The testimony is that it was two feet six inches deep, that it was five feet two inches across. Now, there is certainly room enough there for a man to stand in. And let's see, two feet six inches long, that is, across this way.

The COURT.—I don't think there was any testimony to the effect that it was five feet two inches.

Mr. McFARLAND.—Didn't Mr. Bellis say that it was four or five feet? Even if I am mistaken about that, if the Court please, taking the dimensions of the edger pit as given by the witnesses, there is not testimony by anyone here that the space was too small. There is no testimony that it was smaller than the pit in similar sawmills, or sawmills of the same capacity, and I fail to see where there is any testimony whatever placing any responsibility upon the defendant. Of course, it is for me to argue the advisability to your Honor of taking the case from the jury, where the evidence is insufficient. Your Honor is familiar with the practice, and I submit the case, believing firmly that there is *not* testimony whatever that connects the defendant with this injury. Of course your Honor knows that an employer is not an insurer of his employees, and the plaintiff in this action is confined strictly to the allegations of his complaint; and the testimony has absolutely failed to sustain those allegations.

Mr. McBEE.—If the Court please, as to the question of no testimony as to the length of the board, my recollection is that the testimony was that this board —while I couldn't state positively its length—that at the time of the accident it was still held in the rigid rollers, and if that is not in the record, I would ask to introduce further testimony to that effect, but I think it is in the record. I think that is the testimony of the plaintiff himself, and I remember that Mr. Bellis testified that after a board is released from the rigid rollers, that if it would strike a man's leg it would be held there, because there would be nothing

to push it further except the bottom rollers. That is the only question I had as to the testimony.

Now, as a matter of law, I think that the important points in this case are, first, that this was an inexperienced servant, and it was the duty of the master to warn him, and that, as we have alleged, and I think the appearance of the witness on the stand and the testimony in regard to his experience shows that he was not only inexperienced in this sort of work, but that there was sufficient before the jury for them to pass on the question of his general intelligence and general understanding. The rule, of course, is familiar.

My contention, if the Court please, is that in this case, there is evidence which makes it necessary for the jury to decide from the facts whether that was a dangerous place, whether the defendant was using proper care, whether the defendant had neglected its duty in failing to warn the plaintiff, and whether, under the circumstances, the plaintiff was excusable for what he did. Now, the evidence shows that before he went to work here, two men were employed.

The COURT.—What evidence shows that?

Mr. McBEE.—The testimony of Mr. Goodwin, the testimony also shows.

The COURT.—I don't remember such evidence.

Mr. McBEE.—Your Honor will perhaps recollect this: That the first day, or half day, that he worked, he had an assistant; that the next day he worked alone; that this piled up on him so fast that it was getting away, and that when he turned around here he was turning around in the performance of his

duty, getting the edgings off the table in the rear that got away from him; and in reaching over he stood on one foot and was caught by the board. Now, I think the Court has confined the testimony of Mr. Goodwin—

The COURT.—Before he worked there, two men were employed to do this work?

Mr. McBEE.—I think that is in the record.

The COURT.—I may be wrong; I remember distinctly that he stated upon cross-examination, I think it was, that for the first day or part of the first day he had a young man there assisting him. The Court assumed that that assistant was given because he was green in the work, and it was perhaps to help him a little by way of instruction, and also by a little assistance until he was familiar with it. I don't remember any evidence that the company was accustomed to employ two men there. However, I may be in error; I don't know that it is important.

Mr. McBee, stating it briefly now, what do you conceive to be, on this record, the culpable negligence of the defendant; that is, upon what theory is it contended by you that the plaintiff may recover? What is the negligence for which the defendant may be held responsible in this case?

Mr. McBEE.—First, failure to warn the plaintiff of the danger.

The COURT.—I understand your position on that.

Mr. McBEE.—Second, having this mill so constructed that the pit was too close to the edger.

The COURT.—There is no allegation of such negligence in your complaint, is there?

Mr. McBEE.—No, sir, but we allege that it was a dangerous place to work, and your Honor held upon this demurrer that if a demurrer had been interposed on the ground that it was ambiguous or uncertain, that your Honor would have compelled us to set out more specifically these facts. We allege, however, that it was a dangerous place to work.

The COURT.—Yes; but don't you specifically allege the respects in which the place to work was not properly arranged or constructed? The Court's observation as to the special demurrer was on another point; another point was argued. Now, in your complaint, as I remember it, at the bottom of page six in the copy I have here, you allege that at the time of receiving said injury plaintiff was standing in the place in which he was directed to stand by the said manager, Salscheider, in the performance of the duties required of him, as aforesaid, and that said leg was caught and injured, as aforesaid, by reason of the negligence and carelessness of the said defendant in providing a place of insufficient size for the plaintiff to stand in the performance of his said labor, and in requiring plaintiff to do more work than should be required of one laborer, as aforesaid, and as well as on account of the failure of defendant to warn plaintiff of the danger incident to said place and the performance of said labor, and said board which caught plaintiff's leg as aforesaid was a very wide board, and came across said table and projected and filled a large portion of the space provided for plaintiff to stand in, etc.

There you seem clearly to specify three things in

which you charge negligence—failure to warn, the smallness of the place in which plaintiff was required to stand, and the excessive duties required of him, that is, that he was required to do more than it was possible for him to do.

Mr. McBEE.—If the place had been larger, it would have obviated the necessity of having the pit further back; if the place had been large enough that he could have had free use of himself, free use to handle himself, without coming in contact with these boards, then it might have been possible for the pit to have been within eighteen feet of the edger table.

The COURT.—But the only testimony you have as to the carelessness of the defendant in providing a proper place to work is that of Mr. Bellis, and his specifications were that the sides of this pit should have been slanting instead of perpendicular, and that it should have been further away; he doesn't express any opinion to the effect that the place was too small.

Mr. McBEE.—That, it seems to me, under the testimony, would be a question for the jury. Here we find that wide boards were coming out on one side and narrow boards on the other, and the dimensions having been given, and he had scarcely room to stand; and if he had had more room than that—what I mean is, that it would be a question for the jury, from the facts, and a question on which, these facts being presented to them, they could draw their conclusions themselves. And the fact that there was too much work is shown by the evidence, because he was doing the best he could to get them out of the way, and they

were passing by him, and piling up; not only were edgings coming out here, but slabs also.

However, I will ask to insert an amendment at this time in the complaint; I should like to frame it in accordance with the suggestion, that the place was dangerous and improperly constructed in this, that the pit was too near the edger-table to permit boards of the length being sawed there to be freed from the roller edges before reaching the pit; in paragraph four, I ask to amend by inserting in the second line of paragraph four, after the word "works," "that the pit in which plaintiff worked was situated and constructed too near to the edger-table to permit boards of the length that were sawed in said mill to be freed from the edger and rigid rollers connected therewith before reaching said pit."

Also, in paragraph five, after the word "him," in the eighth line, on page six, "and on account of the insufficient length of said edger table, as hereinbefore set forth."

Mr. McFARLAND.—I object to the amendments; they come too late. And I claim that they are not in furtherance of justice, and, besides that, I can't see that those amendments would cure the insufficiency of the testimony in this case; there is no absolute testimony that this edger-table was too short from the rollers to this end; there is no testimony as to the exact length of the board that came through there, if the Court please. I submit, if your Honor please, that your Honor knows that any board coming through, whether it was an eighteen-foot board or a ten-foot board, would strike the tailer if he got in its

way. It hasn't been shown that this board was longer than the edger-table, and for that reason more dangerous than a ten-foot board. We claim that this table was eighteen feet long from the edger to this end of the table, and an eighteen-foot board could come through this, and when that end was through the edger, this end would be down about this place; then the edger has no hold upon it at all. The only force given the board is while one end of it, or one part of it, is under the edger and being rolled out by this stationary roller and the spike roller—what you call a dead and a live roller. After it leaves this edger there is only force enough to carry it on the roller. Now, the fact that the board struck him—he stood here. Mr. McBee said he had no room. If he was taking care of the tailings on this side of this table, why he should stand nearer that edge. He knew—he had been tailing there for eight days, according to his own testimony—he knew that a board came on either side of him; he knew that when he was clearing the edgings from one side of the table he shouldn't stand over here.

There is no testimony here from any point of view, from any facts, that this is naturally a dangerous place to work; there is no witness who has testified to that. Bellis testified as to a conclusion, and he said he would consider it dangerous, and he went on and said why: That if a board came out and the board was longer than the edger-table and should strike the tailer while it was being rolled from under this edger, that it would probably injure him, but

he didn't say on account of the dimensions of this box; he didn't say naturally the pit was too small.

We went to trial on this case as made by the complaint and answer, if the Court please, and I can't see yet, even if they were permitted to amend this complaint, how there is any evidence here that shows any negligence on the part of the defendant in the construction of this machinery, or in this place, or in placing more labor upon this defendant than he could perform. He worked there for eight days; he certainly must have had some idea about the mechanism of this machinery, the functions of it, and the operation of it, and I don't understand now, and I don't believe anyone who heard the testimony, taking his statement as true—and this motion does that—how he could work here, stand on one foot, and take the tailings away from here, and hold his knee up two feet and a half, so that a board coming down could strike the inside of his knee joint. And I think, where they have failed to make out a case sufficient to go to the jury, if the jury should bring in a verdict, that your Honor will no doubt set it aside, on account of the insufficiency of the evidence, and that we ought not to have to put our case to the jury. And I desire to say this, that I have a number of authorities that bear me out, and if your Honor has any doubt, at the noon hour I could get your Honor any number of authorities supporting my position.

The COURT.—The authorities are very voluminous; the difficulty always is the application to the particular case. The general principles are very well understood, and there isn't really a great deal of dif-

ference or variance among the authorities upon the general principles.

I entertain very grave doubt as to whether or not the plaintiff has made such a case as should be submitted to the jury, but there is one theory upon which I think I shall resolve that doubt in favor of the plaintiff for the present. I think possibly the Court should submit it to the jury upon this theory, that, taking the plaintiff's testimony as true, as the court must, he applied for work in this mill, with the knowledge on the part of the management that he was inexperienced in this kind of work; they put him to work in this particular place, which, obviously, entailed some danger. It isn't necessary to introduce witnesses to testify that a place of this kind exposes the operative to some danger. Now, as to just how this accident occurred is surrounded by some mystery, as is suggested by counsel for defendant; as to just how plaintiff's leg could have been injured at the place and in the manner in which he has suggested isn't clear to the Court. As I understood the plaintiff, he testified that the leg was caught between the roller and the board upon the right-hand side, as he stood facing the edger. Now, if his leg had been caught where he says it was caught, that is, in the hollow of the knee-joint, by the board upon the other side, then the conditions would be quite clear, that is, that in taking off these tailings he turned his back to the edger and in that way threw his right side where his left side was accustomed to be, only further over, so as to bring that leg in front of the moving board, which ordinarily was upon his left side—that

is, upon his left side as he stood facing the edger; but how his right leg could have been caught in the manner in which he says it was—caught by the board upon the right side—unless his entire body was over still further to the right side, isn't clear. But, if his testimony is true, the defendant here failed in the performance of its duty to him in not advising him of the dangers incident to the employment, the perils surrounding the place where he was required to work. That, of course, doesn't necessarily imply that the plaintiff can recover.

Assuming that plaintiff wasn't warned, assuming that the employment was necessarily dangerous, assuming further that the defendant was not negligent, so far as providing a reasonably safe place for the workman is concerned, there is the further question as to whether or not the conditions were so obvious that they were appreciated, that the danger was appreciated, or could, by the exercise of reasonable prudence upon his part, considering his age, his experience and lack of experience, and his intelligence, whether or not he should, by the exercise of ordinary prudence, have appreciated the danger. If that question be answered in the affirmative, it is immaterial whether or not he was warned.

It is a very close question as to whether or not the Court should assume, as a matter of law, that he did appreciate this danger. In the light of the intelligence with which the plaintiff has testified, the Court couldn't adopt the theory suggested in the complaint, and suggested by counsel, that he is of a simple or immature mentality; the plaintiff has shown, at least

usual, if not unusual, intelligence upon the witness-stand.

I think, however, for the present, gentlemen, I shall deny the motion, and the defendant may renew the motion, or move for a directed verdict when the testimony is all in, perhaps without further argument, and I may, at that time, reconsider the conclusion which I have just stated.

To which ruling of the Court the defendant then and there excepted.

The COURT.—Yes. I will say, gentlemen, with regard to the request for amendment, that the testimony in support of such an allegation is so unsatisfactory that I shall decline to grant the request.

(Here the jury returned into court.)

The COURT.—Gentlemen of the jury, you will meet the Court at half-past one.

(Adjournment until 1:30 P. M.)

Court met at 1:30 P. M., pursuant to adjournment, all parties being present, and the following proceedings were had, to wit:

[Testimony of Dr. John Busbee, for the Plaintiff.]

Dr. JOHN BUSBEE, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows, on

Direct Examination.

(By Mr. McBEE.)

Q. State your name and residence.

A. John Busbee, Harrison, Idaho.

Q. What is your occupation?

A. Physician and surgeon.

(Testimony of Dr. John Busbee.)

Q. How long have you been such physician and surgeon? A. Eighteen years.

Q. Actively engaged in the practice during that time? A. Yes, sir.

Q. Where were you educated for your profession?

A. In McGill University, Montreal, Canada.

Q. Do you know the plaintiff, George Goodwin?

A. Yes, sir.

Q. When and where and under what circumstances did you first meet him?

A. The first time I saw him was on the 16th of November, 1907; he came down from St. Maries on the afternoon of the 16th of November and went up to the hospital.

Q. Where is that hospital?

A. It is in Harrison, about a quarter of a mile from the boat landing.

Q. Who was conducting that hospital at that time?

A. I was, I was conducting it myself.

Q. All right; go on.

A. Mr. Goodwin walked from the dock up to the hospital, and the nurse in charge telephoned—my residence is down in the lower end of town—she telephoned to me that there was a new patient at the hospital, and I went up there and examined him. At that time it was pretty hard to get any definite information from him; he wasn't rational; he had a temperature of, I think, 103, or a little over 103, at that time.

Q. What ailment, if any, did he have at that time?

A. The only trouble that I could discover on look-

(Testimony of Dr. John Busbee.)

ing him over was some tenderness around the right knee-joint; that apparently was the only place where he had any, that is, anything abnormal; there wasn't anything the matter with his lungs or heart; in fact I looked him all over, and that was the only place where I could see anything out of the way.

Q. Did you give him any treatment?

A. I used—it was rather difficult to keep him in bed; he wanted to get up all the time and go out of the room, and I had to keep a nurse with him practically all the time and give him sedatives to keep him quiet, and for the first two or three days I just used local applications on the knee-joint—used different hot applications.

Q. Well, what further did you do with reference to treating that afflicted leg?

A. His condition remained practically the same from day to day; his temperature remained about the same, and his head didn't clear up, and the leg kept getting—spreading, kept getting worse, more inflammation in it, and I think it was three or four days after he came in that I opened the leg the first time. I made an incision above the knee-joint and found probably half a teacupful of pus; drained that; and three or four days after that another swelling developed under the knee in the space back of the knee-joint, and I opened that; I presume that I opened the leg six or eight different times, different abscesses formed. After he had been in the hospital probably about a month and a half under this treatment, opening the different abscesses and draining them, when I was quite

(Testimony of Dr. John Busbee.)

positive that if something radical wasn't done that he would die—his general condition remained about the same as it was when he first came in, and I talked the matter over with him and told him that in my opinion it was the best thing to do to have the leg removed, it was practically the only chance for him to get over it; and he consented to that, and I amputated the leg. I removed all the bone that was diseased; his leg, I believe was amputated about the upper third of the thigh, is where it was taken off. After the leg was amputated, his condition began to improve right away, and in five or six weeks after that he was in shape so that he could get around, and I believe went out of the hospital about six weeks after the amputation.

Q. Did you make any examination of the bone after the leg was amputated, that portion which you did amputate? A. Yes.

Q. What did you find?

A. The bone was decomposed; practically all the lower part of the femur, that is, the thigh bone, was soft enough so that you could put a knife through it, and the knee-joint and the upper part of the tibia, that is, the large bone of the leg that goes to make up the knee-joint, that was also the same way.

Q. From an examination and from your experience with that leg, what would you say caused that trouble?

A. The disease is what is known as osteomyelitus —the name of the disease that Mr. Goodwin had.

The COURT.—Just a little louder.

(Testimony of Dr. John Busbee.)

Mr. McBEE.—What did you say that disease was?

A. Osteomyelitus.

Q. Can't you put that in common English?

A. It is an acute inflammation of the bone. It really means—osteomyelitus means inflammation of the bone itself—not the periosteum, but the bone itself.

Q. The periosteum is the lining, outer wrapping of the bone? A. Yes.

Q. And this was in that substance beneath the periosteum? A. Yes.

Q. What, in your opinion, from what you know about it, caused that condition—what generally causes such conditions?

A. Well, that is very hard to tell, what caused the attack; an attack of osteomyelitus is a good deal similar to an attack of any other disease—an attack of pneumonia, for instance, only in pneumonia the lung is involved—and exactly what the cause was I couldn't tell.

Q. If, knowing what you do about it, you also knew that sometime in June of the same year the patient had had his leg severely bruised by being caught between, being pressed between a board moving against it with great force on the one hand, and a table or rigid structure on the other hand, state whether or not that injury would contribute to this disease?

Mr. McFARLAND.—If the Court please, that being a hypothetical question, I object to it on the ground that it does not state all of the facts of the

(Testimony of Dr. John Busbee.)

case, and it is not based or founded on the evidence in this case; this is a hypothetical question addressed to an expert, and should contain all of the circumstances leading up to this alleged injury and the conditions afterwards.

The COURT.—The objection is overruled.

To which ruling of the Court the defendant then and there duly excepted.

The COURT.—Answer the question, Doctor, that is, if you can, if the facts are sufficient upon which to base any opinion.

A. In my opinion, the fact that the leg had been injured previously would predispose, I believe, to an attack; I don't think that it would bring, that if a person was going to have an attack of that nature, that if any particular bone in his system had been injured previously very likely that would be the part that would be involved, that he would be more liable to have an attack there than if there hadn't been any previous injury to the bone.

Cross-examination.

(By Mr. McFARLAND.)

Q. Doctor, you said that this disease of the bone, which you term osteomyelitus, is an acute disease. Now, will you explain to the jury just what you mean by acute disease?

A. An acute disease is one that comes on very suddenly; there is no previous symptoms at all. An acute disease usually comes on with a severe chill; a person may be perfectly well to-day and right now,

(Testimony of Dr. John Busbee.)
and an hour from now be seriously ill. That is what is known as an acute disease.

Q. Now, in making your diagnosis of his case, did you examine the exterior of the knee-joint?

A. Yes, sir.

Q. Did you discover any scar there, or scars?

A. Yes, sir; there was a scar on the back of the joint, back of the knee-joint; I believe it was on the outside, more towards the outside of the back of the joint.

Q. What was the condition of that scar, as to being thoroughly healed, or otherwise?

A. Yes, it was thoroughly healed.

Q. Did it appear to be an old scar?

A. It apparently was, yes.

Q. I will ask you to state whether or not, from your diagnosis of the case, you arrived at the opinion or conclusion that the scar and the condition you found the knee in had existed since childhood or infancy?

A. I didn't quite understand the question.

(Question read by stenographer.)

A. No, I didn't think it had.

Q. I don't mean the inflamed condition, but I mean the condition of those old scars.

A. No, it didn't exist, I wouldn't think that it existed from infancy.

Q. Did you come to the conclusion that he had been troubled with this osteomyelitus during infancy to any extent? A. No, I wouldn't think so.

Q. Now, you say that the bone was decayed for a

(Testimony of Dr. John Busbee.)

considerable space above the knee-joint, the thigh-bone? A. Yes, sir.

Q. About how far above did you find this softness in the thigh bone?

A. It extended up, fully up to the middle of the thigh. I would like to explain that, if it is not out of the way. When the patient first came under my observation this trouble was pretty well limited; it didn't extend any further than probably an inch above the joint; but this extension had taken place under my observation; it was spreading all the time, spreading fast, real fast.

Q. How far below the knee-joint did this softness and decayed condition of the bone extend?

A. Well, it took in about one inch of the tibia, that is the bone of the leg, about an inch below the joint.

Q. What is the usual cause that produces osteomyelitus?

A. Well, it is a disease that is due to the same causes as erysipelas of the skin; it is really an erysipelas of the bone; that is the common name of it: erysipelas of the skin and this bone disease we are speaking of are due to the same organism, the same bacteria; in fact the diseases are similar, and the commonest causes of bringing it on are exposure and injury.

Q. Is it common for diseases of this kind, or this disease, to originate or be caused directly from a bruise?

A. Well, it isn't very common, no; that is given as one of the main causes of the trouble, an injury.

(Testimony of Dr. John Busbee.)

Q. How long could this acute condition have existed at the time you first saw the patient?

A. I don't think it could have existed over forty-eight or seventy-two hours, at the outside.

Mr. McBEE.—For how long?

A. Not over two or three days, the acute condition.

Q. And you say that that condition does not come on gradually, but comes on suddenly, just like pneumonia or erysipelas? A. Yes.

Q. I presume you made a thorough examination of his knee and these scars that you found there, and the condition of his leg about his knee prior to making this incision, did you not? A. Yes, sir.

Q. And afterwards, up to the time that you amputated the limb? A. Yes, sir.

Q. Now, from your experience as a physician and surgeon, and from this diagnosis that you made of the plaintiff's case, in your opinion was that diseased condition of his knee caused by an injury such as Mr. McBee explained to you in his hypothetical question?

A. Well, it is very hard to tell. The injury, in my opinion, would predispose to it, but I wouldn't be willing to say that the injury was the cause of this attack that he had.

Q. After your examination and diagnosis of the case, didn't you come to the opposite opinion or conclusion, that it was not the cause of it?

A. No, I didn't; in fact I hadn't any absolutely definite idea just exactly what the cause of the attack was.

(Testimony of Dr. John Busbee.)

Q. And you couldn't say now what the cause of it was?

A. No, I wouldn't want to say, and I couldn't say.

Q. You wouldn't be willing to tell this Court that this bruise that has been described to you, or this injury that Mr. McBee described in his hypothetical question even contributed to that condition, would you, or that disease?

A. Well, just as I said, possibly if the injury weakened that particular leg, or that part of the bone, and he was going to have an attack of this kind, it might possibly predispose to it, the same as a person if they had some light lung trouble, they would be more likely to have an attack of pneumonia possibly than a person who didn't have.

Q. That disease could well exist without any injury to the leg, couldn't it? A. Yes, sure.

Q. You say it is often due to exposure. What kind of exposure, for example?

A. Well, getting thoroughly chilled is the commonest cause, thoroughly chilled; if they overexert themselves, get to sweating, sit down in the woods, or sit down outside and get thoroughly chilled, anything of that nature of exposure, I mean.

Q. Isn't that a more frequent cause for osteomyelitus than most any that you know of?

A. I don't know.

Q. Have you ever made any comparative comp son of the causes of that disease, the different cau

A. No, sir.

Q. You never tried to keep track of that?

(Testimony of Dr. John Busbee.)

A. No.

Q. What do you call this lining that is over the bone? A. The periosteum.

Q. Now, in what condition did you find that?

A. The periosteum was very much congested. When it is in a normal condition it is white, it is as white as the lining of an egg-shell, and looks very like that, and when there is any inflammation, it gets red, real red.

Q. Is the periosteum over the knee-joint alone?

A. It covers every bone in the body, the periosteum.

Q. These scars that you have described, were they in that inflamed condition that you described the periosteum? A. No, the scars were just in the skin.

Q. They were entirely healed, weren't they?

A. Entirely healed.

Q. And appeared to very old scars?

A. Well, it is very hard to tell how old a scar is. After three or four months, after the redness goes out of it, a year old scar looks like a ten year old scar. It is really impossible to tell the age of a scar.

Q. Take a case where a person has received an injury, we will say on the inside of the knee-joint, on the right-hand side, to such an extent or such a serious injury that would result in osteomyelitus, wouldn't that disease be apt to make its appearance, if caused by that reason alone, at an earlier date?

The COURT.—At an earlier date that what?

Mr. McFARLAND.—Then the difference between

(Testimony of Dr. John Busbee.)

the fore part of June and the 16th day of November of that same year.

A. Yes, if the disease existed at all, of course it would have showed up sooner, it certainly would.

Q. Now, where a person on the 3d, 4th or 5th of June, 1907, should receive such an injury to his knee as I have described in my former question, of sufficient seriousness, graveness, to result in osteomyelitus, wouldn't that disease develop earlier than the following November? A. Yes, it would.

Redirect Examination.

(By Mr. McBEE.)

Q. Doctor, do you mean that it would develop in the acute form within a very short time necessarily?

A. If the disease was going to develop at all, of course, it would come on within twenty-four hours; an acute attack of osteomyelitus is something that don't linger long; if he was going to have it, it would come on within twenty-four hours.

Q. Does it exist in any other form than acute?

A. No, that is the only form that you get, the acute form.

Q. Well, if it develops in the early stages and treatment is had, can its further progress be arrested?

A. Sometimes it can be arrested if the inflammation develops close enough to the periosteum; sometimes it will originate, or develop, rather, in the very center of the bone, and if that is the case the chances are that half of the bone is going to be lost anyway, but if the inflammation develops close up to the covering, to the periosteum, and the tension is relieved

(Testimony of Dr. John Busbee.)

within a reasonable length of time, that will very often stop it, and all that will happen will possibly be the loss of a small piece of bone.

Q. Would that depend upon the general condition of the part affected? A. I beg pardon.

Q. I say, would that depend upon the general healthy condition or general condition as to health of the part affected? A. Yes, it would.

Q. And if the part affected had, as we were asked to suppose a moment ago, been injured from three to four months before, would that accelerate the ravages of the disease?

A. Yes, if the part was in a weakened condition, of course it would, the disease would develop much faster; you wouldn't get the same resistance as you would in a thoroughly healthy limb or bone.

(Witness excused.)

Mr. McBEE.—If the Court please, I desire to recall Mr. Goodwin, both with regard to one matter concerning which Doctor Busbee testified, and also in regard to some other matters in which I thought I had disclosed my case, but there are some things that I apprehend are in the record, and your Honor and I differ, and I want to ask as to those matters.

Mr. McFARLAND.—If the Court please, I shall object to any further testimony on the part of Mr. Goodwin. Counsel closed his case this morning, and now after the motion is made and recess taken, he comes into court and desires to open the case. I don't think that is proper, in view of the nature of this case, of the testimony that has been already introduced,

and the condition that the case is in. Your Honor will remember that we adjourned at half past eleven merely in order to give counsel time to consult with Doctor Busbee when he came in, and so as to have Doctor Busbee in court, your Honor took an adjournment till half-past one for that purpose. Now, there was nothing at that time that seemed to have suggested itself to Mr. McBee that he would need any further testimony from Mr. Goodwin, and I don't think it is proper under the conditions of the case, that he be allowed to place this witness on.

Mr. McBEE.—As to one question, your Honor, brought out by the testimony of Doctor Busbee, a matter about which I never knew anything, and of course your Honor knows that this was submitted save for the testimony of Doctor Busbee in order that matters might be expedited.

The COURT.—Well, recall him. You may have your exception, Mr. McFarland.

[Testimony of George Goodwin, for the Plaintiff (Recalled).]

GEORGE GOODWIN, recalled as a witness for plaintiff, testified as follows, on

Direct Examination.

(By Mr. McBEE.)

Q. George, you heard the testimony of Doctor Busbee concerning a scar on your leg, when you went to the hospital? A. Yes, sir.

Q. Do you know what scar that was and what caused it?

(Testimony of George Goodwin.)

Mr. McFARLAND.—I object to that, if the Court please, for the reason that that is reiteration; it has been gone over by this witness.

The COURT.—I think so. He has so testified; that he was injured there.

Mr. McBEE.—The reason I asked it, your Honor, is that I thought from the cross-examination of Doctor Busbee by counsel that they were going to contend that it was an old scar.

The COURT.—The doctor didn't so testify. You may, if you desire, ask him if he had any scar there prior to this injury.

Mr. McBEE.—Did you, George, have a scar there on your right leg, there near your knee, prior to the time you were injured in this mill? A. No, sir.

Q. Now, these other questions, George, state whether or not before you went to work in the—I will withdraw that.

When you were put to work by the defendant tailing the edger did you observe how many men were employed doing the work that you were afterwards put to do, tailing the edger?

Mr. McFARLAND.—I object to that, if the Court please, I object to that as going over the same testimony twice, and reopening their case after the interposition of this motion.

The COURT.—It is really asking the Court to indulge a very liberal discretion, Mr. McBee. I think, however, I will permit him to answer; I can't see that the defendant will be prejudiced. Counsel ought to be careful, however, and prepare their cases.

(Testimony of George Goodwin.)

Mr. McBEE.—I will state to the Court that I am satisfied that the witness did so testify before, and in that I have the concurrence of spectators here.

The COURT.—However, you may ask him again.

(Question read by stenographer.)

A. There was two men doing it when I was put there.

Mr. McBEE.—George, at the time you were injured, as you testified, where were these edgings which you turned around to remove—

Mr. McFARLAND.—I object to that, if your Honor please, as having been gone over by this witness.

The COURT.—I am very sure he testified to that several times. Unless you desire to accentuate some point, well, answer the question.

A. They were going right back on the table that goes to the trimmer; they were getting away from me.

Mr. McBEE.—Where was this trimmer table?

A. It was back of me; I had to turn around to catch the edgings that were getting away from me.

Q. Now, at the time you were caught by this board, as you have testified, where was the other end of that board?

Mr. McFARLAND.—I object to that, if the Court please, as having already been gone over.

The COURT.—The objection will be sustained; he has gone over that three or four times.

(Testimony of George Goodwin.)

Cross-examination.

(By Mr. McFARLAND.)

Q. George, you were down there working on the deck when you first went to that sawmill, were you?

A. Yes, sir.

Q. Could you, from the deck, see the man tailing the edger up there in the mill?

A. From the first deck I was on I could.

Q. How many days did you say the two men were tailing that edger?

A. I couldn't tell exactly how many days.

Q. Can you swear positively that two men tailed that edger a whole day while you were there?

A. Yes, sir.

Q. Who were those men?

A. I didn't know the men.

Q. Were they both standing in the pit?

A. One was in the pit and the other on the outside.

Q. On which side?

A. On the left-hand side.

Q. And you don't know how long he tailed it?

A. No, I don't know exactly how long they were at it.

Q. And that was just one day that you saw them?

A. Yes, one day I saw them.

Q. Just only one day?

A. I saw them more than one day there.

Q. How many days did you see them?

A. I know I saw them two days there anyway.

Q. What two days?

(Testimony of George Goodwin.)

A. I don't know exactly the days of the week.

Q. Was it the day you went on to tail the edger yourself?

A. No, I went on in the morning; I started in in the morning.

Q. Was it the day before you went on to tail the edger? A. I believe it was.

Q. You are not sure about it?

A. That is what I guess.

Mr. McFARLAND.—That's all.

Mr. McBEE.—That is all; we rest.

Mr. McFARLAND.—If the Court please, I desire to call a matter to your Honor's attention, and I would like to have the jury excused for a few moments.

The COURT.—Gentlemen of the jury, just step out into the hallway.

(Jury leaves courtroom.)

[Motion (Renewed).]

The COURT.—I will say to counsel that as a rule I accede to the wishes of counsel in letting the jury go out, but I am very clear that it really isn't necessary. If a motion for nonsuit is made and denied, it is the custom of the Court to advise the jury that they are not to consider the ruling of the Court as in any wise affecting their judgment, and I think the instruction is given in such a way that neither party secures any advantage or disadvantage by reason of it.

Mr. McFARLAND.—I merely ask that, your Honor, because I am not familiar with the practice

in this court, and it has been usual in our state courts to do that.

The COURT.—I know it is more or less customary, but I think the jury is sometimes helped by knowing all that goes on in court.

Mr. McFARLAND.—I desire to renew the motion that I made this morning, and to add to it the following, in regard to the insufficiency of the testimony of plaintiff:

First: That the testimony does not show that the loss of plaintiff's leg resulted from any injury that he received while in the employ of the defendant, or that the amputation of the plaintiff's leg was caused by any injury that plaintiff received while in the employ of the defendant, through the carelessness or negligence of defendant, or otherwise.

Second: That the testimony does show that the amputation and loss of plaintiff's leg was caused by reason of and on account of a disease of the bone of his leg which could not have been caused by any injury that he received while in the employ of the defendant.

Third: That the testimony does not show that the injury which plaintiff claims to have sustained while in the employ of the defendant contributed to the disease on account of which his leg was amputated, or that it, directly or indirectly, brought on the condition of plaintiff's leg which required its amputation.

Does your Honor desire to hear from me on that?

The COURT.—Do you think that any one of those grounds would authorize the Court to take the case

away from the jury? Suppose it should be deemed to be true that the amputation was not directly or indirectly due to the injury, still the Court couldn't take the case away from the jury.

Mr. McFARLAND.—If the Court please, I would like to know how the jury would arrive at the measure of damages in that case.

The COURT.—That is a different question.

Mr. McFARLAND.—And how the jury could decide, then, if the matter is left to the jury, whether the injury received, or even the suffering which plaintiff claims to have suffered, was caused by this disease or by the injury he received while in the employ of the defendant.

The COURT.—That is a problem that the Court isn't solving at the present time. But you can very well see that if the original injury was due to the actionable negligence of the defendant, plaintiff would be entitled to recover some damages. You are asking the Court here to direct the jury to find a verdict for the defendant. Very clearly, if he was injured and suffered pain, and was disabled for a while from work, he would be entitled to recover something to compensate him, even though the amputation was necessitated by some other cause or condition. I think I will not hear you upon that point at the present time; I can't see how it is possible for the Court to regard that as a warrant for taking the case away from the jury.

Mr. McFARLAND.—I think that the complaint alleges the loss of the limb through the negligence of the defendant, rather, through an injury received by

the plaintiff while in the employ of the defendant, and through the carelessness and negligence of the defendant, and that is the basis of their claim and prayer for damages.

The COURT.—If that were the sole basis of complaint, the Court could properly consider your point, and would hear both sides upon it, but there are other damages alleged: It is alleged that plaintiff suffered some pain and some physical injury. Upon the evidence as it stands he did suffer some physical injury there—there was a bruise—so that I would, in any view of the case as to the amputation, be under the necessity of submitting the case to the jury. Call the jury, Mr. Bailiff.

To which ruling of the Court the defendant then and there duly excepted.

(Jury brought into court.)

The COURT.—Do you desire to make a statement, Mr. McFarland?

[Statement by Mr. McFarland.]

Mr. McFARLAND.—Yes, your Honor. May it please your Honor and gentlemen of the jury, in this action we expect to prove that this sawmill in which the plaintiff performed work and services was a modern constructed sawmill; that all of the machinery, including this edger, the edger-table, and the edger pit, was the latest improved and approved machinery and tables for that kind of work; we expect to show that there was plenty of room in this pit for any man to attend to the duties of tailing the edger, without any danger of any accident or injury to him; we expect also to show, gentlemen of the

jury, that from the edger or edgers to this end of that edger-table was a distance of about eighteen feet; that this edger-table or pit was two feet nine inches or seven inches high; that this space of the pit was five feet and two inches wide, and that the pit was two feet and a half long. We expect to show, also, gentlemen of the jury, that at the time that the plaintiff was working for this defendant, that the side of the edger-table back of where he stood was slanting or inclined, and that there was a roller there that if a plank or a board coming from the edger had caught the defendant, as he stated it caught him, that it would have pushed him back upon this roller, and he would have been carried back on the table, just the same as the boards and planks go. We expect also to show you by the testimony of witnesses that it was absolutely impossible for the plaintiff to have been injured in the way that he claimed he was injured; that at the time when he was tailing the edger, they were sawing yellow pine logs from 12 to 16 feet long, and no longer; that the general run and greater per cent of these logs were from 12 to not exceeding 16 feet long; that occasionally there was an eighteen or twenty foot log, but it was simply a pole, a very narrow log, and that the board that plaintiff claims struck him, if any struck him, did not exceed in length 16 feet. We expect to show you that an 18-foot board could run through that edger and one end reach the end of this table without being held or fastened in the edger. We also expect to show that while these boards were traveling across this edger-table, after leaving the edger, upon

these rollers, that anybody could take one end and stop them, that they didn't run with any force at all. We expect also to show that one man could very easily attend to the duties of tailing the edger, and that only one man was put to that task by this defendant, and that at no time did it require the services of two men. We expect to show you also, gentlemen of the jury, that plaintiff was working on the deck there among the logs, and that at that time Mr. Salscheider, who was foreman of the mill, warned him of the dangers of his work and being in and about sawmills, and that Mr. Goodwin was always asking for work with increased pay; that he was always looking for a better job, where his pay would be increased; and that about the time he began tailing the edger, or just before, Mr. Salscheider told him that if he could tend to that, that those services paid $2.75 per day; and he said that he would take the job. Mr. Salscheider told him then that he would let him have a boy to assist him until he got onto the work, until he understood the work, and that he commenced that work; and that he did furnish him a boy about 17 or 18 years old, and that boy worked at the side of Mr. Goodwin and assisted him in tailing the edger all the time that Mr. Goodwin tailed the edger.

We expect to show also, gentlemen of the jury, that at the time that Mr. Goodwin claimed that he received this injury, there was just back of him a man by the name of Bro, who was acting as slasher; that Bro's position from Goodwin, the distance of it was only eight feet; that Bro worked as slasher all

the time and every day that plaintiff worked in the capacity of tailer, tailing the edger; that at no time did this boy who was assisting the plaintiff, or Mr. Bro, see or know of any accident or injury occurring to the plaintiff; that they heard no outcry at all.

We expect to show you, gentlemen of the jury, that this filing-room in which one of the witnesses testified that he was at the time of this alleged injury is at least 136 feet from this edger pit; that when the mill is running in full force, or as it was at the time that plaintiff claimed that he was injured, that it was absolutely impossible to hear any outcry or any voice in that mill; that a man speaking or hollering or screaming from the edger pit could not be heard one-half of that distance.

We expect to show you, gentlemen of the jury, otherwise, that this tailer pit was one of the safest points or places in the sawmill in which to work, and that the defendant was not injured while in that employment, or that if he was injured that the injury was of a light character, and was such that at the time he received the injury he gave no notice of it, made no outcry, and did not complain.

We expect to show you, gentlemen of the jury, also, that the plaintiff, after tailing the edger awhile for the defendant company, went over to the B. R. Lewis Lumber Company's sawmill, and worked two days there, that is, the 30th and 31st of May, and then went back, I think about the first of June, and worked a day and a half, or the first and third of June, on the deck; that he commenced tailing the edger again on the third or fourth, working a half

day on each of those days. We expect to show you that at the time that he worked for the B. R. Lewis Lumber Company, during that time, and we expect to show you that he did the usual work there, that he didn't do any sweeping, wasn't employed to do sweeping, and that he didn't complain of being crippled or lame during that time, didn't show any sign of being crippled or lame.

We expect also to show you that he went up to St. Maries, I think in October, and worked fifteen days at hard work moving a saloon building, and that not once during that time did he complain or show any evidence or symptoms of being lame or having received any injury.

Now, I do not deem it necessary at this time to give you in detail all that we expect to prove, but in addition to what I have said, I will say that we expect to show you, to contradict the testimony of the witness Bellis and of Mr. Goodwin upon all of the material points of their testimony.

If the Court please, I have a number of witnesses here who are very anxious to get back; they are filling important positions in other places. It will be taking them out of the order of the testimony to examine them first, but I will do so.

The COURT.—You may offer them in such order as you see fit.

[Testimony of Fred A. Amsbaugh, for the Defendant.]

Whereupon FRED A. AMSBAUGH was called, sworn and testified as a witness on behalf of defendant as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. Where do you reside?

A. Coeur d'Alene City.

Q. What is your occupation?

A. Assistant Superintendent of the Blackwell Lumber Company.

Q. What business were you engaged in during the months of May and June, 1907?

A. Timekeeper for the B. R. Lewis Lumber Company.

Q. Are you acquainted with the plaintiff, George Goodwin? A. Yes, sir.

Q. I will ask you to state what the fact is as to whether he worked at the B. R. Lewis Lumber Company's sawmill in the month of May, 1907.

A. He worked there two days in the last half of May.

Q. Can you state just what those days were?

A. The 30th and 31st.

Q. Now, what particular work was he engaged in doing at that time?

A. When he was working in the sawmill he was taking care of the timbers that were coming from the saw on the live rolls, going down on the timber dock.

(Testimony of Fred A. Amsbaugh.)

Q. What kind of work is that, with regard to being heavy, laborious work, or otherwise?

A. Well, it is not what you would call very light or very heavy; but where they are sawing large timbers it takes a pretty good man to handle them.

Q. It is such as requires a good man to tend to, is it? A. Yes, sir.

Q. Did he work there in June of the same year?

A. He worked two or three days, three or four days in the first half of June.

Q. Can you tell those days, give those days?

A. I think it was the 13th, 14th and 15th.

Q. What particular work was he engaged in at that time? A. He was in the planing-mill.

Q. What doing?

A. Why, that would be whatever there would be to do there from one place to another.

Q. What work is done usually in a planing-mill?

A. Planing lumber; that would be taken away from the machines, or working on the transfer, putting the lumber into the mill, taking it off—whatever the work would happen to be.

Q. What is the fact as to whether, during any of these times that you have mentioned, he did any sweeping there, or was employed to sweep in or about the mills? A. Not to my knowledge.

Q. Were you timekeeper at that time?

A. I was.

Q. If that had been the case would you have known it? A. I would, sir.

(Testimony of Fred A. Amsbaugh.)

Cross-examination.

(By Mr. McBEE.)

Q. What were your duties as timekeeper?

A. Taking the time of the men employed.

Q. Is it your duty to direct what they should do?

A. No, sir.

Q. How many men were employed by the Lewis Lumber Company at that time?

A. I couldn't say just now.

Q. Do you know what each man was doing?

A. Yes, sir.

Q. You do now?

A. Why, I know pretty near what most of them were doing, if their names were called off to me.

Q. How many men did you say were at work?

A. I couldn't say.

Q. About how many men, in your best judgment, were you keeping time for during the time Goodwin worked there?

A. The crew varies all the time.

Q. When was the first time Goodwin worked there? A. The 30th and 31st of May.

Q. On the 30th and 31st of May how many men, in your best judgment, were working there for whom you were keeping the time?

A. I couldn't say.

Q. Was there a hundred?

A. Yes, sir, there was more.

Q. Was there two hundred?

A. Somewheres near 150 or 200 men.

Q. Possibly more than 200?

(Testimony of Fred A. Amsbaugh.)

A. Might have been; I couldn't say.

Q. Might have been 250? Might there have been 250 men working there at that time?

A. There might have been.

Q. Might there have been 300? A. No, sir.

Q. Might there have been 275?

A. There might have been.

Q. Might there have been 290?

The COURT.—I wouldn't pursue that further; I can't see that it is very important.

Mr. McBEE.—What were your duties besides keeping the time?

A. Various work, looking after the freight coming in and going out; looking after the roustabout crew on the outside.

Q. Were you personally acquainted with Goodwin when he began work there?

A. No, sir, no more than I was or am with any other man that goes to work there.

Q. Some of them you are personally acquainted with, and some you aren't?

A. Sometimes there is a man comes there that I am acquainted with.

Q. I am asking you how it was as to Goodwin.

A. I was not acquainted with him, no, sir.

Q. Do you remember where and when you first saw Goodwin?

A. I don't remember of ever seeing him until he came there to work.

Q. You remember seeing him then?

A. I do, sir.

(Testimony of Fred A. Amsbaugh.)

Q. And he worked two days?

A. Two days in May.

Q. Do you know why he didn't work after May 30th and 31st? A. I do not.

Q. Do you know whether the mill run the day after the 31st? A. Yes, sir.

Q. The mill did run? A. Yes, sir.

Q. There was a period then for a little while that he didn't work? A. Yes, sir.

Q. You don't know how that happened?

A. I do not.

Q. Then he went to work again about what time?

A. The 13th of June, as near as I remember.

Q. He was off about two weeks?

A. No, sir, he was off from the first to the 12th, the 1st and 12th inclusive.

Q. He was off 12 days? A. Yes, sir.

Q. You don't know anything about why?

A. I do not.

Q. Do you remember positively that you saw him on those two days, or do you just remember it from what the time-book shows?

A. I remember seeing him there on those two days.

Q. The 30th of May was Decoration Day. Was your mill running that day? A. Yes, sir.

Q. You remember as a positive fact that you saw him there that day? A. I do, sir.

Q. Do you remember as a positive fact, independent of your time-book, that you saw him there the next day? A. Yes, sir.

(Testimony of Fred A. Amsbaugh.)

Q. Is your memory so good as that as to the other men working there? For instance, if you had a man named John Jones working there, could you say positively that such a man was there on the 30th, or would you have to look at your time-book to find out?

A. No, sir, after I got acquainted with a man I would know he was there.

Redirect Examination.

(By Mr. McFARLAND.)

Q. Mr. Amsbaugh, I will ask you to state whether or not Mr. Goodwin showed any lameness or complained of being lame or crippled in any way while he was there?

A. He did not, to my recollection, no, sir.

Recross-examination.

(By Mr. McBEE.)

Q. Was there any of the various men employed around there on the 30th of May that did walk lame that you know of?

Mr. McFARLAND.—I object to it as immaterial and not proper recross-examination.

A. I don't remember.

The COURT.—Overruled.

Mr. McBEE.—But you remember that Goodwin wasn't lame? A. Yes, sir.

Q. You don't remember as to the other men?

A. There was no one there lame that I know of; no, sir.

[Testimony of Jerry McCarter, for the Defendant.]

Whereupon said witness was excused and thereupon JERRY McCARTER was called, sworn and testified on behalf of defendant as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. Where do you reside, Mr. McCarter?

A. St. Maries, Idaho, Kootenai County.

Q. What is your occupation?

A. Contractor and jobber, moving buildings.

Q. What was your business in the months of October and November, 1907?

A. Moving buildings.

Q. I will ask you if you are acquainted with the plaintiff? A. Yes, sir.

Q. How long have you known the plaintiff?

A. He went to work for me on the 15th day of October, 1907, worked for ten days and a half, quit on the night of the 26th of October.

Q. What kind of work was he engaged in?

A. Moving the Idaho Saloon building, known as the Idaho Saloon.

Q. What kind and character of work was that, as to being heavy, laborious work, or otherwise?

A. Yes, sir, it was pretty heavy work, jack-screwing the building up.

Q. Did it require a good strong man to do it?

A. It required a pretty good man, yes.

Q. During the time that George Goodwin worked for you, did you notice any signs of his being lame or crippled? A. Not to my knowledge.

(Testimony of Jerry McCarter.)

Q. Did he ever complain to you of being lame or crippled?

A. Not to my known knowledge.

Cross-examination.

(By Mr. McBEE.)

Q. Did you work with him, or was you superintending the job?

A. I was superintending the job; I don't pretend to work.

Q. What is your occupation?

A. Contractor and jobber.

[Testimony of H. W. Strathern, for the Defendant.]

Whereupon said witness was excused and thereupon H. W. STRATHERN was called, sworn, and testified on behalf of defendant as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. Where do you reside? A. Post Falls.

Q. How long have you lived there?

A. Eighteen years.

Q. What is your occupation?

A. Sawmilling.

Q. How long have you been engaged in sawmilling? A. About 25 years.

Q. What part of sawmilling have you attended to or been engaged in, what special part of the work?

A. I have really been in every part of it.

Q. Have you ever constructed any sawmills?

A. Yes, sir.

Q. How many and where?

A. I constructed the one that I now operate.

(Testimony of H. W. Strathern.)

Q. What is the capacity of that mill?

A. Fifty thousand capacity.

Q. Have you worked in sawmills, also?

A. Yes, sir.

Q. Have you ever tailed the edger?

A. Yes, sir.

Q. Have you ever acted as a slasherman?

A. Yes, sir.

Q. Worked on the deck? A. All places.

Q. Acted as superintendent and general manager? A. That is what I am now.

Q. Do you know the Coeur d'Alene Lumber Company's sawmill there at Coeur d'Alene, Idaho?

A. Yes, sir.

Q. How often, during the last two years, have you been in and about that mill?

A. About an average of once a month.

Q. Are you familiar with the construction and machinery of that mill? A. Fairly well.

Q. Are you familiar with the plan and mode of operating the mill? A. Yes, sir.

Q. Did you observe, on any of these trips while there, the edger-table? A. I did, sir.

Q. When was the last time you took notice of that edger-table?

A. About five weeks ago, I think.

Q. Did you make any inspection of it?

A. Yes, sir.

Q. Did you make any investigation of this edger pit where the edgerman stands in tailing the edger?

A. Yes, sir.

(Testimony of H. W. Strathern.)

Q. Now, you may describe this edger-table and pit, together with the appliances, you might say appurtenances, to this jury.

Mr. McBEE.—I object to that, for the reason that it is not sought to have this witness testify as to the condition at the time of the alleged accident.

Mr. McFARLAND.—We will follow that up.

The COURT.—Very well, you may answer the question.

Mr. McFARLAND.—I don't mean to promise that by this witness, your Honor.

The COURT.—No.

A. This pit, what he calls a pit, is not what I call a pit, but it is all right by that name—it is about 18 feet 6 inches from the last roll that comes out the back of the edger. The hole or pit where the man stands is a place left vacant between two rolls; the rolls belong to the back carriage of the edger. The space is 5 feet, 1 inch wide, by 2 feet, 6 inches wide. The Coeur d'Alene mill is a double mill, where mine is only a single mill; their edger is about eighteen inches wider than what my edger is; therefore when they are working the lumber comes through on each side, and when the man stands in the middle there is about 3 feet, 6 of a space clear where he can work in.

Q. How deep is this edger pit?

A. It is 2 feet, 9 inches from the floor to the top of the under side of the board, or the top of the roll, so it just strikes me just at the top of the leg. If

(Testimony of H. W. Strathern.)

a board was coming out, if I was stooped a little, it would strike me right in the pit of the stomach.

Q. Now, describe the edger-table just back of this pit, back of where the tailer stands in the pit.

A. There is a plank put in so that if a board—they are liable to bend up or bend down as the case may be, so there is a plank set at an angle so that it will strike that plank and work up to the roll and go straight over the roll.

Q. What is the fact as to whether this siding of the edger pit that is back of the edgerman is slanted or on the incline, or otherwise?

A. That is slanted.

Q. How long have you known that condition to exist, the condition of this siding?

A. It has always been that way since I was around that mill.

Q. When was the first time you was around that mill?

A. The first time was about two years ago, when I was sawing for the Coeur d'Alene Lumber Company.

Q. What month was that, do you know?

A. About August.

Q. Two years ago in August?

A. This coming August.

Q. I will ask you to state, from your experience as a sawmill man, and from your observation and inspection of this edger pit, whether it is a safe place in which a man may work without danger to himself.

A. I would say it is.

(Testimony of H. W. Strathern.)

Q. Now, what is the fact as to whether an 18-foot board coming from the edger would strike a man standing in that edger-pit while tailing the edger, if he stood in the position where he belonged, or that was intended for him?

A. No board would strike him if he was where he should be.

Q. What is the fact as to whether or not an 18-foot board coming from this edger would strike a person standing in front of it with force or otherwise? A. It would just stop it.

Q. Now, how do these boards come from the edger across this table, as regards rapidity or swiftness, or anything of that kind?

A. Coming through the edger, they come pretty fast, and after they leave the edger they die off. If they should strike a man there would be no force; there would be nothing but the force of the board.

Q. How do you account for that?

A. Because it has left the rolls.

Q. What provisions are made there, if any, for taking care of these edgings or tailings?

A. Why there is chains along the floor; you just throw these edgings off to one side, and the chains comes along and trails them off to one side, to the slasher.

Q. Do you know the duties of the tailer of the edger in that sawmill?

A. I do not, in that sawmill.

Q. Have you been there frequently when that mill was running at its full capacity, or full force?

(Testimony of H. W. Strathern.)

A. Yes, sir; it was mostly running when I was there.

Q. Have you been to this edger pit?

A. Yes, sir.

Q. Have you ever seen more than one man tailing the edger at a time?

A. I believe there was two the last time I was up, but there was only one in the pit; the other was standing at the side.

Q. Was he tailing the edger or just standing there?

A. No, I think he was helping, more on timbers that was going out.

Q. Do you know where the filing-room is there?

A. Yes, sir.

Q. Have you been in that filing-room?

A. Yes, sir.

Q. Do you remember seeing a bench sitting there in that filing-room?

A. There is quite a few benches there.

Q. When was you in that filing-room last?

A. About the time it started up, about, I should say, about six weeks ago.

Q. Do you know where the filing-room is, with reference to the edger pit?

A. I should judge it would be about 110 or 115 feet, just to guess at it.

Q. Is it possible for any man to stand in that filing-room and hear a person in the edger pit cry out or holler when the mill is running in full force?

A. Well, I would doubt it very much.

(Testimony of H. W. Strathern.)

Q. What is the fact as to the operation and running of the mill making noise or otherwise, much noise?

A. There is considerable noise, especially with the two bands, the cutting, that is right beside the filing-room.

Q. Is there such a thing in tailing the edger; where these boards are running through the edger, for the tailings to come out in great volume and run over onto the table back of the edger, where a person uses ordinary care in tailing the edger?

A. Not if a man uses judgment, because the boards come through there one by one.

Q. There is one on either side of the tailer?

A. One on either side, as the case may be.

Q. Where do these boards go after leaving the edger and coming down the edger-table?

A. They go right past him.

Q. And what becomes of these tailings?

A. The man that stands there picks them up as they pass him and throws them over on each side of him onto the chains.

Q. Now, supposing this table to be the edger-table, and that end the edger, and this space between these tables to be the edger pit, in tailing the edger in that mill would there be any necessity for the tailer to turn around with his face in this direction (indicating), and hold up his right leg, so that his knee-joint would be level with the surface of the edger-table, in performing his duty of tailing the edger?

A. No occasion whatever.

(Testimony of H. W. Strathern.)

Q. And if he did so do, and a board should come through the edger, an 18-foot board should come through that edger, would it strike him with sufficient force to produce any injury, strike him on the knee?

A. It might knock the skin off, or something like that, you know, but I don't see what occasion it has to strike him at all.

Q. Do you see how it could strike him?

A. Not if he was tending to his business.

Q. Did I ask you the question as to whether it would take him over the rollers or not? Suppose that a person was standing in that pit tailing the edger, and an 18-foot board should come through the edger and down the table, and while he was standing there on his left foot, leaning forward with his right leg lifted up, with his knee on a level with this table, and a board should strike him on the inside of his knee-joint, on the right-hand side, would that board press his knee or body up against the table behind him, that part of the edger-table that stands behind him, and hold him there or keep him there?

A. I never seen anyone try it.

Q. Is it possible to do that?

A. No, I think if the board caught him at all, I think it would knock him right out of there and send him back over the rolls.

Q. The roll would take him over onto the other table?

A. Yes, onto the other table, over the roller.

Q. What have you to say in regard to the mechanism of this edger-table and edger-pit, as to being

(Testimony of H. W. Strathern.)

on the crude plan or constructed of improved material and machinery? What is the fact as to that?

A. I think the edger as it stands to-day is the latest improved.

Q. What have you to say as to whether or not the edger-table is too short for the purposes for which it is used?

A. It is about eight feet longer than the one I have got and I never had an accident in mine.

Q. Is it too short or too long?

A. I don't think so; I don't think it is any too short.

Q. What have you to say as to whether this edger-pit is too small for a man to stay in and tail the edger with safety to himself?

A. It is certainly large enough.

Cross-examination.

(By Mr. McBEE.)

Q. Did you ever have any experience in a two-band sawmill?

A. No, I never worked in a double-band.

Q. This is a double-band mill?

A. Yes, sir.

Q. And your edger-pit is made for a one-band mill? A. Yes, sir.

Q. What becomes of the slabs in this mill of the Coeur d'Alene Lumber Company?

A. They go out on the rolls.

Q. Suppose the slabs went out over the edger-table, how would that affect the safety of the place?

(Testimony of H. W. Strathern.)

A. You couldn't get then through the edger, Mr. McBee; a slab won't go through the edger.

Q. No, but did you ever notice a mill in which the man who was tailing the edger took care of the slabs also? A. Why, my man does it.

Q. Do they in this mill of the Coeur d'Alene Lumber Company?

A. No, there was an extra man in their mill.

Q. Is that the extra man you spoke about?

A. No.

Q. Would it be asking too much of a man in the position of tailing the edger in the Coeur d'Alene Lumber Company's mill to ask him to take care of the slabs also and tail the edger at the same time?

A. I don't think he could do it, because the slabs are too far away from him.

Q. You saw two men there the other day. I wish you would tell me what this other man was doing?

A. They was cutting timbers when I was there on the small mill, and he was attending to taking away the timber, and giving this man a hand occasionally.

Q. He was helping with the edgings also?

A. Yes, sir.

Q. The edgings were coming from the two saws?

A. Yes, sir.

Q. And he was helping some? A. Yes, sir.

Q. How do you come to be so exact about these distances? Did you measure them?

A. Yes, sir.

(Testimony of H. W. Strathern.)

Q. You went and measured them, to qualify yourself as a witness?

A. I was asked to measure them after I was subpoenaed.

Q. You knew you would be a witness?

A. I didn't know, but I supposed—

Q. You never before that had made very careful observations as to these distances?

A. I didn't measure them before.

Q. You could only have estimated the distances?

A. Yes, sir.

Q. Now, Mr. Strathern, the fact is as to what is a proper distance—this pit wants to be far enough away so that the board is out of the rigid rollers before it reaches the pit. That is true, isn't it?

A. Not exactly.

Q. It isn't necessary to have them out?

A. No, sir, my experience has been the opposite.

Q. Why?

A. There is rolls in front of the edger, and there is rolls on the back of the edger. I will explain to you why: As long as each of the rollers catch a board it will never twist, but after it reaches the front rollers and nothing but one roller on the back of it, if a knot or anything catches it, the board is liable to wheel around, but the other way it is impossible for a man to get hurt if he was six feet nearer to the saws.

Q. Suppose he was 12 feet from the saws and handling eighteen-foot boards.

A. Yes, sir, it is much safer, in my estimation

(Testimony of H. W. Strathern.)

than further back. As I have explained, about the rollers, the rollers in front of the saws, as well as back of the saws, as long as each of those rollers has got a board on top of it it cannot wing, but after it leaves the saw it might swing a little.

Q. How fast do these boards travel through the edger saw?

A. I should say about 100 feet a minute.

Q. And after a board comes out and has been released by these rollers which hold it fast, and another board pushing right behind it, if it were pushed against a man's leg in the pit, it would push with considerable force, would it?

A. I would say so.

Q. Of course, he could take hold of the board and lift it out?

A. If the board was going straight he wouldn't require to do that.

Q. If one board was entirely through the rollers and another coming through pushing against this released one, would push against the leg of a man in the pit it would push against it with considerable force and speed, would it? A. I would say so.

Q. And might jam his leg up against the other side of the pit?

A. Yes, if his leg was in the way, it certainly would.

Q. And might injure him? A. Yes, sir.

Q. And a green-hand in there is liable to get caught, isn't he?

(Testimony of H. W. Strathern.)

A. I don't think a man would put a man in there unless he notified him; I know I never do.

Q. In other words, there is sufficient danger about that place to justify a man, in putting a man in a place of that kind, to notify him of the danger?

A. Yes, sir.

Q. And you, as a prudent millman, would give him such warning, wouldn't you?

A. Yes, sir.

Q. You have told about this incline on the back end of the pit. Suppose there wasn't any incline there, but that it was straight up and down, and a man's leg was caught, it might crush it pretty hard, might it not?

A. That would be against the roll.

Q. And if the incline was there it would have a tendency to push him out on the table?

A. If the board was down below the center of the roll, it would.

Q. What is the fact about the level of the edger-table and the trimmer-table behind it?

A. I wouldn't like to be positive.

Q. The table behind is supposed to be a little lower? A. Yes, sir.

Q. But the roller— A. Is level.

Q. You have business dealings with the Coeur d'Alene Lumber Company, Mr. Strathern?

A. I have had, but I have none just now.

Q. You have had, from time to time, for the last two years? A. Yes, sir.

Q. You sawed for them? A. Yes, sir.

(Testimony of H. W. Strathern.)

Q. You sawed their logs at your mill?

A. Yes, sir.

Q. Your relations have been pretty intimate with Mr. Carroll? A. Yes, sir.

Redirect Examination.

(By Mr. McFARLAND.)

Q. Mr. Strathern, can the man who feeds the edger, or puts the boards in the edger, put them through fast enough to have one board catch up with another and push it coming through the edger?

A. Well, not very easy.

Q. Isn't it almost impossible for one board to follow so fast after another as to catch up with it and push it ahead of it, coming through the edger?

A. As a rule about four feet is the best they can do, about four feet between each board; they can't get them any faster than they are cut off the big mill, and we calculate from four to six feet clear for each board as we drop them off.

Q. What is the fact as to where a man is putting the boards through the edger the first board gets out and on the edger table, clear of the edger, before the other gets through the edger?

A. That is, it would be near.

Q. I will ask you, did you ever know of your knowledge of one board coming out right after another, pushing it through the edger?

Mr. McBEE.—I object to that.

Mr. McFARLAND.—I will withdraw it.

(Testimony of H. W. Strathern.)

Recross-examination.

(By Mr. McBEE.)

Q. If the edgings would get piled up the board which had left the roller might be temporarily stopped until the other board would catch up that four feet or eight feet distance, might it not? Such things have happened?

A. If it would stop them, it was past the man and it was impossible for it to catch him.

Q. If it was a short board?

A. A ten-foot board, or an eight-foot board.

Q. That might happen? A. Yes.

Redirect Examination.

(By Mr. McFARLAND.)

Q. Where the edgings would get piled up on the tailer's left, would that have anything to do with the boards being stopped on his right, coming through the edger? A. Not at all.

The COURT.—You have given the dimensions of this pit; its length is about twice its width. In which direction was it long, and in which direction wide?

A. The wide was the long way; the opening is the width of the edger.

Q. That is about five feet?

A. Five feet, one inch.

Q. And it is as long as the edger is wide?

A. It is as wide as the edger is wide; this hole is just the opposite of any other; the width is the long way.

(Whereupon said witness was excused.)

(Testimony of Erick Ostblom.)

Mr. MORGAN.—If your Honor please, Doctor Busbee stated to me that he has three patients who are very ill at Harrison, and he is very desirous of returning—ill with pneumonia—and he is very desirous of returning. We have brought him here and if the defense desires him I think they should pay him.

The COURT.—Gentlemen, such a case should appeal to counsel. If you are going to use him, Mr. McFarland, couldn't you use him at this time?

Mr. McFARLAND.—I could not right now, your Honor.

The COURT.—What time does the train leave that he will have to take?

Mr. McBEE.—Four-forty.

The COURT.—If it were simply his convenience, it would be a different thing, but if he has patients who are depending upon him, it would be better to let him go.

Mr. McFARLAND.—If I could get away for a short time to see Doctor Busbee, I could decide.

(Here a recess was taken for five minutes.)

[Testimony of Erick Ostblom, for the Defendant.]

Thereupon ERICK OSTBLOM was called, sworn and testified on behalf of defendant as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. What is your full name?

A. Erick Ostblom.

Q. Where do you reside?

(Testimony of Erick Ostblom.)

A. Sandpoint, Idaho.

Q. What business do you follow?

A. I work any place I can get a job.

Q. What are you doing at Sandpoint?

A. Working in a planing-mill.

Q. Where were you in May and June, 1907?

A. Worked for the Coeur d'Alene Lumber Company.

Q. What were you doing there for the Coeur d'Alene Lumber Company during that time?

A. Sawing wood.

Q. Are you acquainted with the plaintiff, George Goodwin? A. Yes, sir.

Q. I will ask you to state whether you saw him at any time in the month of May or June, tailing the edger there for the Coeur d'Alene Lumber Company?

A. I did.

Q. Was anyone assisting him? A. I was.

Q. Do you know the time he left the mill there?

A. Yes.

Q. Did you assist him up to the time he quit tailing the edger and left? A. Yes.

Mr. McBEE.—I suggest that you ask questions which are not leading.

Q. What is the fact as to whether or not you received any injury while tailing the edger there?

A. Me? No, I didn't receive any injury.

Q. He? A. I didn't see him.

Q. While he was in the edger-pit tailing the edger how near to him would you be?

A. Oh, about three or four feet.

(Testimony of Erick Ostblom.)

Q. What is the fact as to whether or not at any time while he was tailing the edger a board struck him and pushed him up against the roller back of him and held him there for awhile, and dragged him around, and he got out and walked off and went down stairs?

A. I never seen anything of the kind.

Q. Do you remember when he commenced tailing the edger there? A. Yes, sir.

Q. Did you commence helping him that first time?

A. Yes.

Mr. McBEE.—I object to that as leading.

The COURT.—Yes; ask the question in a different form.

Mr. McFARLAND.—What is the fact as to the time you commenced assisting Mr. Goodwin as to whether or not it was the first day he commenced tailing the edger? A. I don't understand.

Q. Well, what time did you commence assisting him with reference to the time he first began tailing the edger?

A. I couldn't tell the time it was.

Q. What I mean is this: Had he commenced tailing the edger before you began assisting him to do so, or did you commence at the same time with him?

A. I commenced at the same time.

Q. What is the fact as to whether you assisted him all the time he was tailing the edger?

A. Yes, I did.

(Testimony of Erick Ostblom.)

Cross-examination.

(By Mr. McBEE.)

Q. What are you doing now?

A. Working in a planing-mill.

Q. Where? A. Sandpoint. Idaho.

Q. How long have you been working there?

A. Oh, about three or four months.

Q. How old are you? A. Nineteen.

Q. When did you last work for the Coeur d'Alene Lumber Company? A. Last fall.

Q. How long had you worked there at the time you quit, how long had you been working?

A. About a month.

Q. You worked there is the summer of 1907, when Goodwin was there? A. Yes, sir.

Q. When did you quit there?

A. I don't know; it was about the first of August.

Q. What was you doing through July?

A. I was working in the planing-mill.

Q. What was you doing in June?

A. Well, I couldn't tell you how long I did work in the planing-mill.

Q. What was you doing just before you went into the planing-mill?

A. I was working on the wood saw.

Q. What kind of work were you doing on the wood saw? A. Cutting wood.

Q. Making firewood out of the slabs?

A. Yes, sir.

(Testimony of Erick Ostblom.)

Q. Where is that slab saw with reference to the edger, or the edger-pit?

A. It is right back of it.

Q. How far back?

A. I couldn't tell—something about—

Q. Were you working on that wood saw during any of the time that Goodwin was tailing the edger?

A. No, I quit working there then and helped him.

Q. Helped him on the edger?

A. Yes, sir.

Q. How long did you help him on the edger?

A. Oh, somewheres about four days—I couldn't tell exactly.

Q. Then what did you do?

A. Back on the wood saw again.

Q. Do you remember who worked then tailing the edger, after that?

A. It was the slasherman; I helped him.

Q. No. I say do you remember who took Goodwin's place tailing the edger? A. No, sir.

Q. Did you help the man who took Goodwin's place, tailing the edger?

A. I helped him for half a day.

Q. Do you know who he was?

A. He was the slasherman.

Q. Did you see Goodwin any more after he quit tailing the edger?

A. I don't know whether he was there after that or not, whether he was there.

Q. Do you remember whether you saw him any more after that? A. No, I don't.

(Testimony of Erick Ostblom.)

Q. Who told you to help Goodwin?

A. The mill foreman.

Q. Who was that?

A. Him sitting right there.

Q. Do you know what his name is?

A. I know his first name.

Q. What is his first name?

A. I heard them call him Herman.

Q. You don't know his other name?

A. No.

Q. Would you know it if you would hear it?

A. I have heard something—I don't remember what it is.

Q. Well, what did he tell you about going to work?

A. He told me to go and help him there a few days until he got used to it.

Q. What did you do in the way of helping him?

A. I was taking the edges off from one board while he was taking the other.

Q. Which side did you work on?

A. On his left side.

Q. Where did you stand?

A. At the outside of the edging-table.

[Testimony of Albert Bro, for the Defendant.]

Whereupon said witness was excused and thereupon ALBERT BRO was called, sworn and testified on behalf of defendant, as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. What is your full name?

(Testimony of Albert Bro.)

A. Albert Bro.

Q. Where do you live?

A. Coeur d'Alene.

Q. What is your occupation?

A. Engineering I follow generally, but, of course, I have been working at common work.

Q. Where are you working in a sawmill?

A. On the slasher.

Q. Where—in Coeur d'Alene?

A. Yes, sir.

Q. Were you working in the month of May and June, 1907? A. Yes, sir.

Q. For whom? A. For Mr.—

Q. For whose sawmill?

A. The lumber company.

Q. Coeur d'Alene Lumber Company?

A. Yes, sir.

Q. At Coeur d'Alene? A. Yes, sir.

Q. What were you doing in the sawmill during those months? A. Working on the slasher.

Q. What is this slasher?

A. Cutting slabs.

Q. Can you describe the machinery to the jury?

A. Well, of course, it is saws—I can describe some of it.

Q. Do you know where the edger-table is in the sawmill? A. Yes, sir.

Q. Do you know where it was at that time?

A. Certainly.

Q. Well, how far is this slasher where you stood performing your duties from the edger-pit?

(Testimony of Albert Bro.)

A. Just about eight feet, I should judge.

Q. Now, where was it, with reference to the edger-pit? Was it behind or in front of it, or on the side of it? A. On the side of it.

Q. Which side?

A. I was on the left side.

Q. Say, for instance, that this is the edger-table, and I am the edgerman or tailer, and I am fronting this way, towards the edger, on which side was this slasher? A. On the right side.

Q. I mean, fronting this way. Would it be on that side?

A. It would be on the left side.

Q. And how far—I believe you said eight feet. Now, was there anything at that time between the slasher and the edger-pit which would obstruct your view of the edgerman or tailer? A. No, sir.

Q. Did you work at that job all during the month of May, 1907? A. I think I did, yes, sir.

Q. Did you work at it all during the month of June, 1907?

A. No, sir; I quit during the first part of June.

Q. What day in June?

A. I couldn't tell you about that.

Q. Do you know how many days you worked in June?

A. No, sir, I don't recollect, but it was the first part of June that I quit.

Q. You can't say whether it was the 4th, 5th, or 10th? A. No, sir, I don't recollect.

Q. Do you know Mr. Goodwin, the plaintiff here?

(Testimony of Albert Bro.)

A. No, sir, I am not acquainted with him at all; I don't remember seeing the man at all.

Q. Do you remember of his working in this sawmill?

A. They claim he was, but I don't know the man.

Q. Do you know who was tailing the edger the latter part of May and the fore part of June there?

Mr. McBEE.—That is, do you know of your own knowledge?

A. Well, I know of my own knowledge that there was a man there, but, of course, I wasn't acquainted with the man.

Mr. McFARLAND.—Do you recognize this as the man who was there at any time during those months?

A. Well, I think I do.

Q. Was there any one assisting him while he was tailing the edger? A. Yes, sir.

Mr. McBEE.—If the Court please, that identification was not satisfactory.

The COURT.—You can cross-examine him at the proper time.

Mr. McBEE.—This question he asks, was anyone with him there, assumes that he was the man, and the witness has not said that it was.

The COURT.—You can cross-examine him later.

Mr. McFARLAND.—Who was that person, if you know? A. That was helping him?

Q. Yes.

A. It was a young fellow that was working there.

Q. Do you know his name?

A. No, sir, I do not.

(Testimony of Albert Bro.)

Q. Would you know his name if you was to hear it? A. Yes, I think I would.

Q. Was it Erick Ostblom?

A. Yes, sir, that is the young fellow.

Q. Is it the young man who is attending court here as a witness? A. Yes, sir.

Q. Do you know how long this man who was tailing the edger there with young Ostblom worked at that particular job, tailing the edger?

A. I think he worked two half days there—I don't know how long he worked there, but I know he worked there.

Q. You know that—that is your memory?

A. Yes, sir.

Q. During that time that he worked there, did you know of any accident or injury happening to him? A. No, sir, I do not.

Cross-examination.

(By Mr. McBEE.)

Q. Do you recognize this man as the man who worked on the edger there?

A. Well, I will tell you—

Q. Answer yes or no.

The COURT.—No, he needn't answer yes or no.

A. I supposed he was the man, but as I was telling you, I wasn't acquainted with the man; I never took notice particularly.

(Question read by stenographer.)

A. Yes, I recollect him all right.

Q. Did you recognize him a moment ago when you were talking about him?

(Testimony of H. L. Olsen.)

A. I don't know if I did or not.

Q. How do you recognize him—by what somebody told you?

A. Yes, somebody gave me some information yesterday about him.

Q. And that is how you know that he is the same man? A. Yes, sir.

Q. If it hadn't been for that information, you wouldn't know? A. No, sir.

Q. When did you quit work on that slasher?

A. I quit the fore part of June; the first part of June.

[Testimony of H. L. Olsen, for the Defendant.]

Whereupon said witness was excused, and thereupon H. L. OLSEN was called, sworn and testified on behalf of defendant, as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. What is your full name?

A. H. L. Olsen.

Q. Where do you reside, Mr. Olsen?

A. Coeur d'Alene.

Q. What is your occupation?

A. Photographer.

Q. How long have you been engaged in that business? A. About thirty-five years.

Q. How long have you been engaged in that business in Coeur d'Alene?

A. About fourteen months.

Q. Do you know where the Coeur d'Alene Lumber Company's sawmill is there? A. Yes, sir.

(Testimony of H. L. Olsen.)

Q. Do you know where the edger table connected with that sawmill is situated? A. Yes.

Q. And the edger pit?

A. Well, I don't know just what you call it—

Q. Well, the box in the edger-table.

A. Yes.

A. I will ask you if you took a photograph or photographs of the interior of that sawmill, or room where this edger-table and pit are, including the edger-table and pit? A. I did.

Q. When was that, Mr. Olsen?

A. The first picture was taken about the 28th of April, the second about a week afterwards.

Q. April, what year? A. This year.

Q. The first was taken on the 28th of April, this year, and the other when?

A. About a week later.

Q. I hand you Defendant's Exhibit "A," and ask you if that is one of the photographs you took at that time. A. Yes, sir.

Q. I will ask you to state what the fact is as to that being a good likeness and representation of the planer mill and the interior—I mean the edger-table, the edger-pit, and the room and surroundings?

A. I believe it is as good as could be made, under the circumstances.

(Marked Defendant's Exhibit No. "A.")

Q. I will ask you to examine this photograph marked Defendant's Exhibit No. "B," and ask you what it is.

(Testimony of H. L. Olsen.)

A. That is the same part, taken a little closer in, closer range; the same view, only being taken at a shorter distance.

Q. With a man in the edger-pit?

A. Yes, sir.

Q. Who was that man in the edger-pit?

A. I believe his name is Salscheider, the foreman of the mill.

Q. This gentleman sitting here? A. Yes.

Q. I will ask you to state what the fact is as to that being a good likeness or representation of the edger-table, the edger-pit, the surroundings and the man in the pit?

A. Why, as to the edger-table and surroundings, I believe it represents it as well as it could; as to the man, of course it couldn't be considered a specially good likeness of him under the circumstances, because it was a back view.

Mr. McBEE.—I don't know what your object is; I am going to admit that these are photographs, and taken when he says.

Mr. McFARLAND.—I offer them in evidence, Defendant's Exhibits "A" and "B."

Mr. McBEE.—I object to them being introduced in evidence, on the ground that they don't represent conditions at the time of the accident. If there is any rule by which exhibits are required to be offered at the time the witness is on the stand, I waive that. Unless they are identified as representing the conditions at that time—

(Testimony of Herman Salscheider.)

The COURT.—Can't you withhold them until you show that the conditions were the same at that time?

Mr. McFARLAND.—Yes, I withdraw my offer for the present.

[Testimony of Herman Salscheider, for the Defendant.]

Whereupon said witness was excused and thereupon HERMAN SALSCHEIDER was called, sworn and testified on behalf of defendant as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. You may state your name in full.

A. Herman Salscheider.

Q. Where do you reside?

A. Coeur d'Alene City.

Q. What is your occupation?

A. Mill foreman.

Q. Where are you engaged in that work?

A. Coeur d'Alene Lumber Company's mill.

Q. At Coeur d'Alene City? A. Yes, sir.

Q. How long have you been working there in that mill?

A. Three years the 18th day of June, next June.

Q. In what capacity have you been working in that mill? A. Foreman.

Q. What are the duties of the foreman?

A. To look after the crew and keep the mill going.

Q. Have you ever had any other experience in the sawmill business? A. I have.

Q. Where?

(Testimony of Herman Salscheider.)

A. In Wisconsin and Minnesota.

Q. How long and how much?

A. About twenty years.

Q. In what capacity?

A. First a millwright, and I have run a mill for the last nine years.

Q. What are the duties of a millwright?

A. Keeping up the machinery and building mills.

Q. Have you ever constructed or assisted in the construction of sawmills? A. Yes, sir.

Q. Of the kind or character of the Coeur d'Alene Lumber Company's mill? A. Yes, sir.

Q. How many mills have you assisted in the construction of?

A. Oh, probably twelve or fifteen—I could count them.

Q. Are you familiar with the mechanism and the machinery of the Coeur d'Alene Lumber Company's sawmill? A. Yes, sir.

Q. Were you so in the months of May and June, 1907? A. Yes, sir.

Q. I will ask if you know the plaintiff here?

A. I do.

Q. When did you first see him?

A. Along about April 1st, 1907.

Q. Where?

A. He came to the mill looking for work.

Q. Did you have any conversation with him?

A. I did.

Q. What did he say to you?

(Testimony of Herman Salscheider.)

A. He wanted work and he came there several times.

Q. Well, did you have any conversation with him after that and before he went to work there?

A. He came three or four times before he went to work, before I had an opening for him, after April, 1st.

Q. What conversation, if any, did you have with him at any of those times?

A. Nothing more than I told him I didn't have a chance for him, and if there was one, I would give him a chance.

Q. When did he go to work?

A. April 16th, 1907.

Q. What work did he do at that time?

A. I put him on the little log deck.

Q. Describe that little log deck.

A. The logs are kicked out over a big chain onto a small chain about thirty-two feet, then they go onto the spike rollers; he runs them up, then rolls them onto the spike rollers.

Q. What was Goodwin's duty on the log deck?

A. To roll the logs out of the rollers.

Q. How long did he work in that capacity?

A. He worked there until May 27th, that is, he worked on the little deck until about May 25th—he worked two days on the big deck.

Q. What was he doing on the big deck?

A. Picking out logs—about the same thing; he pulls the logs out of the pond on the big chain.

Q. He worked there about how long?

(Testimony of Herman Salscheider.)

A. About two days.

Q. What did he do then?

A. We put him on tailing the edger after that, on May 27th.

Q. Why did you put him on, or how did you come to put him on there?

A. He had asked me for a job with more wages several times. At first, on the little deck, he got two and a quarter, and I told him if he could handle it on the big deck I would give him two and a half and afterwards the edger job turned up.

Q. What were you paying on the edger?

A. We paid two and a half, and after that we had to come up on the wages, and paid two seventy-five.

Q. Did you have any other conversation with Mr. Goodwin when he was on the big log deck with reference to his work in the mill?

A. Well, he wanted—we was short a carriageman at one time, and he wanted a chance to go on the carriage, and I wouldn't give it to him.

Q. Did you tell him why? A. Yes, sir.

Q. What did you say to him?

Mr. McBEE.—I object to that as improper, irrelevant, and immaterial, and not responsive to any issue in the case.

Mr. McFARLAND.—I am going to follow it up by other testimony.

The COURT.—The objection is overruled.

Mr. McBEE.—My understanding is that it is necessary to plead warning, if they want to prove it, and I don't think it is pleaded.

(Testimony of Herman Salscheider.)

The COURT.—The Court has ruled, gentlemen; there is nothing before the Court.

A. That is, after he left the deck?

Mr. McFARLAND.—In regard to his going on the carriage.

A. I told him it wasn't safe for him, that he had never rode the carriage.

Q. Did you have any conversation with him with reference to tailing the edger? A. Yes, sir.

Q. What did you tell him about that?

Mr. McBEE.—I object to that as incompetent and immaterial, and not responsive to any issue in the case, and particularly for the reason that it is alleged in the complaint and not denied in the answer that the defendant did not give warning.

The COURT.—Is that true, Mr. McFarland?

Mr. McFARLAND.—I don't think it is; if it is, I shall certainly ask leave to amend.

Mr. McBEE.—It is alleged in the complaint, on pages 3 and 4, paragraph 4: "But that said defendant did not, nor did any of its agents or officers, give plaintiff any instruction whatever as to the dangers attendant upon such work, or inform him of the dangerous place in which he was required to work, or of the fact that more work was required of him than could safely be performed by one laborer."

The COURT.—What part of paragraph 4?

Mr. McBEE.—It is on page 3. I should like to call your Honor's attention to one thing further—

The COURT.—The answer says and denies that said defendant, or its agents or officers did not give

(Testimony of Herman Salscheider.)

plaintiff any instructions whatever as to the dangers attendant upon such work, or inform him of the dangerous place in which he was required to work, and so forth.

Mr. McBEE.—In paragraph 2 they say that Salscheider was not the foreman or manager or superintendent, and the answer is verified.

Mr. McFARLAND.—Not in that same language; don't stop there.

The COURT.—This seems to be denied; denies that he was ignorant of the danger, and denies that they didn't instruct him, and seems to deny everything that you allege there.

Mr. McBEE.—My objection was that there was no allegation that they gave him any instructions. At the beginning of paragraph 2, they deny that he was the manager or agent—

The COURT.—It would make no difference whether he had authority or not. The objection is overruled.

Mr. McBEE.—I would like an exception.

A. I asked him if he cared for the job at $2.75 a day, and told him that I would give him a boy to help him for two or three days, until he got used to the job, and he said he would take it, and went to work the next morning.

Mr. McFARLAND.—Did you say anything to him when he commenced work?

A. I told him that the only danger was that the boards would catch him and shove him out of the hole.

Q. When was that?

(Testimony of Herman Salscheider.)

A. On May 27th; he commenced work on May 27th back of the edger.

Q. How long did he work tailing the edger?

A. Three days and a half altogether.

Q. Was he working at the Coeur d'Alene Company's sawmill on the 30th and 31st of May, 1907?

A. No, sir.

Q. Was he there in the mill? A. No, sir.

Q. Now, while he was engaged in tailing the edger was anyone assisting him? A. Yes, sir.

Q. Who assisted him?

A. Erick Ostblom is his name.

Q. The boy who testified here this afternoon?

A. Yes, sir.

Q. When did Erick Ostblom commence to assist the plaintiff in tailing the edger?

A. On the morning of May 27th, he commenced the same time he did.

Q. At the same time he commenced tailing the edger? A. Yes, sir.

Q. How long did Erick Ostblom continue to assist the plaintiff in tailing the edger?

A. He was there all the time he was, and helped the other man a day and a half or two days.

Q. Then he was there longer than Goodwin?

A. Yes, sir, two days.

Q. Who took Goodwin's place when Goodwin quit tailing the edger?

A. This old Mr. Bro who was here, and Erick Ostblom for two days.

(Testimony of Herman Salscheider.)

Q. What is the fact as to whether it required two men to tail that edger?

A. We never had them there before or since.

Q. What is the fact as to whether the labor or work to be performed by the edger tailer is too great for one man to perform?

A. On yellow pine it is an easy job, as they were sawing at that time.

Q. How is it generally?

A. On tamarack it is a good stiff job.

Q. Can one man tail that edger right along?

A. Yes, sir, they have been.

Q. Has it ever been the custom of the Coeur d'Alene Lumber Company to have more than one man to tail that edger?

A. No, sir, except that time.

Q. Do you know where the filing-room is situated? A. Yes, sir.

Q. Do you know where the bench is that is in that filing-room? A. Certainly.

Q. Now, how far is the filing-room from the edger pit? A. Which part do you mean?

Q. Well, say the lower door.

A. It is just eighty-four feet from the lower door to the pit.

Q. How far is it from the lower door to where this bench is in the filing-room?

A. Thirty-six feet—the filing-room is 32 by 36.

Q. How far it is from the bench to the nearer door?

A. Thirty-six feet—it is back in the corner.

(Testimony of Herman Salscheider.)

Q. How far are these doors apart?

A. About 20 feet.

Q. During the time that Goodwin was tailing the edger how was the mill being operated or run?

A. It was going at its full capacity.

Q. During all that time? A. Yes, sir.

Q. I will ask you to state what the fact is as to whether a person sitting on that bench in the filing-room could hear a person in the edger-pit scream out or holler. A. He couldn't do it.

Q. Why?

A. I have been on the railing time and again, and the slasherman can't draw my attention by hollering, and that is only about 44 feet.

Q. Why? A. The noise is so great.

Q. Do you know Mr. Bellis, the witness who testified here—I believe his name is L. W. Bellis?

A. I know him; yes.

Q. How long have you known him?

A. He has been around the mill off and on since I came there three years ago.

Q. Has he worked there since you have been there?

A. He has been there about two weeks, worked about two weeks nights, as helper in the filing-room.

Q. Who was the filer at that time?

A. Frank Hill.

Q. Do you know where he is?

A. Up in B. C. somewhere, I think.

Q. Did Bellis ever do any other work in that mill while you were there? A. No, sir.

(Testimony of Herman Salscheider.)

Q. During the time that Goodwin, these days that Goodwin was engaged in tailing the edger, do you know what kind of logs were being run through the edger? A. Yes, sir.

Q. What kind were they? A. Yellow pine.

Q. Do you know the lengths of them?

A. They run 12, 14 and 16, with the exception of a small log which would be maybe an 18 or maybe a 20, once in a while,—very few.

Q. What do you mean by a small log?

A. That is a top log, or small tree, about a foot through.

Q. What is the fact as to whether you were running through small or large logs at that time?

A. Yellow pine runs large.

Q. What are the lengths of them?

A. 12, 14, 16—mostly 16.

Q. Will you describe that edger-table—just describe the whole table, the edger-table, as it was at that time.

A. The outside floor is made out of 3 by 12 feet, on edge, with about 4 ribs in it, and four rollers across it, 5 foot 2 long; and the table from the last spike roller to the edger, to the inside of the last roller on the table is just 21 feet.

The COURT.—What is that?

A. The last spike on the roller is driven by friction, is just 21 feet exactly.

The COURT.—I don't understand what he means by the inside roller.

A. There is a roller back of him.

(Testimony of Herman Salscheider.)

The COURT.—You mean it is twenty-one feet to that? A. Yes, sir, to that.

Mr. McFARLAND.—Assuming that this is the edger-table and that the edger rollers were at the front end of this table, how far would it be from the edger to this part of the table, this end of the table?

A. Two feet and a half less; it is just twenty-one feet to the roller back of him, and the pit is two feet and a half long.

Q. What are the dimensions—what were the dimensions of the pit at that time, pit or box?

A. Five foot two by thirty inches.

Q. That is five feet two across this way, across the table, the same width as the edger?

A. Five foot two?

Q. And what is the length up and down?

A. Thirty inches.

Q. Now what was the depth of this pit at that time? A. Two foot seven.

Q. And what is it at the present time?

A. Two foot nine; it was raised two inches.

Q. How was it raised?

A. With jack-screws.

Q. In what way was the top raised, or the floor lowered?

A. The whole thing—we put longer legs under the table.

Q. So that it is two inches higher now than it was when Goodwin worked there? A. Yes, sir.

Q. How was this edger-pit constructed, with ref-

(Testimony of Herman Salscheider.)

erence to the sides? What kind of sides did it have at the time Goodwin worked there?

A. It was all open underneath, but at the last roller there is an incline about eight inches long that raises up.

Q. You mean that back of him it was sided up with an incline?

A. Yes, sir, matched flooring; it has been there since before he came there, and is still there.

Q. Has that siding or incline been changed in any way since Goodwin commenced to work there?

A. There has been a new top put on, new timbers.

Q. Has this siding been changed?

A. No, sir, no change.

Q. Was it just as much inclined at that time as it is now?

A. Yes, sir—put on the same timber, the matched flooring there.

Q. Do you remember the time these photographs were taken that Mr. Olsen testified to?

A. Yes, sir.

Q. Well, at the time these photographs were taken, was the edger-table and the edger-pit, and the surroundings there in the same, or were they the same as at the time Goodwin worked there, with the exception of the table being two inches higher?

A. Yes, sir, exactly the same.

Q. I will ask you to state, from your knowledge of the machinery there, the edger, the edger-table, and those rollers, and your experience as a sawmill man, whether it is possible in running boards through

(Testimony of Herman Salscheider.)
the edger for the tailings to pile up and accumulate or come out in volume, come out of the edger.

A. No, the only way, if the edging should happen to break in two and lodge on the board in front of him, that is the only way, but if it was the same width and sawed in the same place you couldn't push it along.

Q. I will ask you to state whether or not this edger-pit was large enough for a man to stand in while performing the duties of tailing the edger?

A. If it was larger it would be unsafe, the way I look at it.

Q. Why would it be unsafe?

A. You couldn't make it wider; you could make it—now it is two feet six, and a board couldn't tip up; if it was wider it could tip up.

Q. What is the fact as to whether or not a board 18 feet long could come through the edger and leave the edger without reaching this end of the edger-table?

A. It would be clear of the press rollers in the edger then.

Q. That is what I wanted to get at, only I didn't know how to ask it. After an 18-foot board leaves the edger coming down the edger table, what force does it carry with it, if any?

A. There is no force on the board.

Q. Are they easily stopped or difficult to stop?

A. A heavy cut is pretty near all a man can do to stop it.

Q. Say, take an 18-inch board.

(Testimony of Herman Salscheider.)

A. Pick it off the rollers—there is no force to them at all.

Q. While the edger is in operation and boards are coming down on either side of the edgerman, is there such a thing as the tailings or edgings accumulating and passing on over to the table back of the tailer or the edger?

A. There shouldn't be; he should throw them off as they come. He has the same length of time the edgerman has to get the board.

Q. In the performance of his duty tailing the edger is there any necessity for such person to turn with his back to the edger-table and face the carrier or table back of the last roller of the edger-table?

A. No, sir; the only chance he would have to do that would be if an edging should get away from him. If they hit the table back they would stack up there and he could just pull them ahead and throw them back onto the table again.

Q. Would that require any great length of time or great effort on the part of the tailer? Would he have to turn clear around?

A. If the edging once dropped off the roller he wouldn't reach for it; it would go over to the trimmer; it is too high.

Q. He couldn't get it, could he?

A. He could, but he wouldn't do it.

Q. I will ask you to state, where an 18-foot board is run through that edger and comes down the edger-table, is there such a thing as it striking the man who is tailing the edger with such force as to push him

(Testimony of Herman Salscheider.)

against the roller behind him and drag him along, without sending him backwards over the roller?

A. No, sir.

Q. Why? A. I have never seen it done.

Q. I say why is it not possible?

A. The next to the last roller there is an incline, and if anything catches a man there it will throw him out of the hole, which has been done; I have seen it done.

Q. If a man, while tailing the edger, should turn with his right side towards the length of the table and towards the edger, and stoop down with both hands on the back of the edger-table, and raise up his right leg until his knee was level with the surface of the edger-table, would it be possible for such board to strike him with enough force to cause an injury? A. Not an 18-foot board.

Q. Why?

A. Because it is out of the press rollers.

Q. How tall are you, Mr. Salscheider?

A. Five feet ten.

Mr. McFARLAND.—Now, at this time, if the Court please, I offer in evidence these exhibits "A" and "B."

Cross-examination.

By Mr. McBEE.—I wish to examine him. When were these changes made that you speak of?

A. A year ago this last spring, along in February.

Q. In what year? A. 1908.

Q. Do you remember when Goodwin got hurt?

A. I remember the time he claims he was hurt.

(Testimony of Herman Salscheider.)

Q. Weren't some changes made on the following Sunday? A. No, sir.

Q. Do you know that?

A. I know it, because I was there; there was none of them made.

Q. You was there that Sunday?

A. Yes, sir, I was down there nearly every Sunday.

Q. What changes were made, when they were made? What changes were made between that time and the time of taking this photograph?

A. I don't just understand. Since he was hurt, you mean?

Q. Yes.

A. We raised the edger and table there over two inches.

Q. I don't yet quite understand about this board slanting there that could push a man up onto the table if he were caught. Does that lessen the floor space?

A. No. The side of the table, the straight part of the table is right here, and the rollers back there, and it is two feet six from the bottom of the incline.

Q. There would be as much flat area at the bottom as at the top?

A. Yes, the roller is five and a half—it runs within about an inch of the top of the roller and the roller is five and a half inch roller.

Q. How far out would it project?

A. Just across the hole.

The COURT.—The roller is back a few inches

(Testimony of Herman Salscheider.)

from the edge of the table, and this incline reaches from the roller down to the edge, as I understand it.

The WITNESS.—You see this is the edge of the table, and a two by six from here to here, and this is eight inches right here.

Mr. McBEE.—Then it does make an obstruction of a few inches in the space.

A. That guard covers it up.

Q. Is this the identical roller that was in use?

A. Yes, sir.

Q. Are all the materials the same?

A. Yes, sir; there has been no change made.

Q. No substitution of new material?

A. No, sir, not in that part. We have respiked the edger rollers since then.

Mr. McBEE.—I make no objection.

(Defendant's Exhibits No. "A" and "B" admitted in evidence.)

The COURT.—If you think it is important that the jury see them at present, of course you can take the time. Are they both alike, practically?

Mr. McFARLAND.—One is taken with Mr. Salscheider standing in the edger pit.

The COURT.—Well, hand them to the jury; pass them around; it will take only a few moments.

Redirect Examination.

(By Mr. McFARLAND.)

Q. You have examined these photographs that have been admitted in evidence? A. Yes, sir.

Q. I will ask you to state whether or not they are good likenesses and representations of the interior

(Testimony of Herman Salscheider.)

of that room where the edger-table is and of the edger-table and edger-pit and surroundings.

A. They are; they are a little dark.

Mr. McBEE.—Objected to as immaterial and cumulative.

Recross-examination.

(By Mr. McBEE.)

Q. You say you have seen a man pushed up onto this table? A. Yes, sir.

Q. Under what circumstances?

A. By looking around the mill and not watching his business.

Q. What pushed him up?

A. A board, when they get to a long board.

Q. How long?

A. Nothing less than a 20-foot board would just about catch a man, that is all.

Q. You have seen it done in this mill?

A. The next man that took his place got pushed out of there by looking around to the back end of the mill.

Q. About when was that?

A. That must have been about June 8th or 9th.

Q. Some two or three weeks after Goodwin got hurt?

A. No, sir, three or four days.

Q. Three or four days after Goodwin got hurt?

A. Yes, sir.

Q. Now, in regard to getting those edgings off the table back of the edger-table, you say if they

(Testimony of Herman Salscheider.)
are piled up there a man could reach back there and push them off?

A. He could possibly reach them, but would never make no effort to do it.

Q. You heard Goodwin testify that he did do it?

A. He never reached down; he might have reached for one that was up on top of the roller, but after they once leave the roller he wouldn't need to reach them.

Q. Couldn't a man standing on one foot leaning over with his arm reach them?

A. He may, but it would be all he could do to reach them, because they drop a foot and a half from the roller, and two foot down.

Q. What are your hours at the mill?

A. Ten hours—seven to six.

Q. Seven in the morning to six at night?

A. Yes, sir.

Q. You don't bother around there at night after six o'clock? A. Yes, sir.

Q. You are there after six o'clock?

A. Yes, sir, to see that everything is all right to start in the morning.

Q. What time do you quit your work?

A. It depends; I have worked all night there.

Q. And all day too? A. Yes, sir.

Q. You haven't any substitute?

A. I have a millwright, and when he has more than he can do I help him out.

Q. How often are you there at night after you go to your home?

(Testimony of Herman Salscheider.)

A. The chances are we work two or three nights a week.

Q. I am talking about you personally now.

A. Whenever there is any work to do I am there.

Q. You go down there after you quit at six o'clock?

A. If we have a short job, I don't go home to supper; I stay there.

Q. How far do you live from the mill?

A. Eleven blocks.

Q. In which direction?

A. Straight north, Fourth street.

Q. Can you hear the mill?

A. Yes, sir, hear the feed on the little side; it squeals.

Q. That is about all you can hear, isn't it?

A. Yes, sir, unless the wind is that way, but you can always hear the little feed.

Q. You say that mill makes such a noise that if a man were hurt and cried out in pain that he couldn't be heard from the edger-pit to the saw filer's room? A. Yes, sir, I do.

Q. Do you know of any instances where a man was hurt and cried out in pain and couldn't be heard?

A. No, sir, not since I have been there.

Q. Upon what do you base your opinion?

A. When anything is wrong back in the mill and the slasherman hollers, he can't draw my attention; he hits the irons and attracts my attention.

Q. That is easier than tearing his throat, isn't it? Don't you think that a man in pain can cry out louder

(Testimony of Herman Salscheider.)

than a man who knows that he can, by simply tapping on this cylinder—

Mr. McFARLAND.—I object to that.

The COURT.—Sustained.

Mr. McBEE.—What is the longest logs that you saw in that mill?

A. We can saw 34 feet on the big saw.

Q. You say that on this day that Goodwin got hurt, says he got hurt, you don't know anything about sawing any boards longer than 18 feet?

A. We rarely ever get anything in a yellow pine over 18 feet.

Q. You are just speaking on general principles, are you? A. Yes, sir.

Q. When did you first learn that Goodwin got hurt, or that he claimed that he got hurt?

A. I met him up on the corner of Fourth and Sherman streets along about the 18th of June, and he told me then he had just got out of the hospital, on account of his leg being hurt in the mill.

The COURT.—When did you first learn?

A. That is the time.

The COURT.—That was about the 18th of June?

A. Along about the 18th, yes, about two weeks after he left there; he told me he had been at the hospital two weeks.

[Testimony of John F. Smith, for the Defendant.]

Whereupon said witness was excused and thereupon JOHN F. SMITH was called, sworn and testified on behalf of the defendant as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. You may state your name in full, Mr. Smith.

A. John F. Smith.

Q. Where do you reside?

A. Coeur d'Alene, Idaho.

Q. What is your occupation?

A. I am a millwright.

Q. Where do you engage in following that occupation?

A. Coeur d'Alene Lumber Company.

Q. How long have you been in its employ?

A. Since July, 1906.

Q. Did you work there at that sawmill during the months of May and June, 1907? A. Yes, sir.

Q. Were you familiar with the edger-table and the edger-pit and surroundings at that time, during those months? A. Yes, sir.

Q. Were you engaged in any other capacity than millwright since you have been there at the Coeur d'Alene Lumber Company's mill?

A. I had charge of the mill during the night run, at the time we run it nights, and during the absence of the foreman I am expected to kind of take up his work, as nearly so as I can.

Q. Do you know when the plaintiff, George Goodwin, was working there tailing the edger?

(Testimony of John F. Smith.)

A. Yes, sir.

Q. Do you know how long he worked at that job?

A. I couldn't tell just the exact number of days, but he worked there—it was but a short time, but without something to refresh my memory I couldn't tell the exact number of days he worked there.

Q. Did any one assist him while he was tailing the edger?

A. There was a young man worked in there with him.

Q. Do you remember who he was?

A. I couldn't give you his name, because I don't know his name—a young Scandinavian. That is one thing I don't *both* much about—names.

Q. Is he a witness here in this case?

A. Yes, sir.

Q. Now, has that edger-table been changed since Goodwin quit work there in any way?

A. I think there has been a slight change made in it.

Q. What is it?

A. I think it was raised a trifle.

Q. Do you know when it was raised?

A. It was raised the spring of 1908.

Q. That raise just made it two inches higher than it was? A. Yes, sir.

Q. How is the pit now, with reference to its condition and mechanism and dimensions at the time that Goodwin worked there?

A. They are the same; the dimensions of the pit

(Testimony of John F. Smith.)

are practically the same with the exception of the two-inch raise.

Q. How is the siding at the last roller of the edger-table? A. The siding?

Q. Yes, is it in the same condition as it was when he worked there? A. Yes, sir.

Q. How is that constructed with reference to being slanted or on the incline, or otherwise?

A. There is an incline coming up from where he stands up to very close to the top of the roller, probably three-quarters of an inch that incline drops from the top of the roller.

Q. Do you know who put that incline in there?

A. Yes, sir.

Q. Who? A. I put it in myself.

Q. When?

A. That is, I renewed it. The incline was in there when I went in the mill, but I renewed it myself.

Q. When?

A. The spring of 1908, when we were repairing the mill.

Q. Was that just the same as it was when Mr. Goodwin was there? A. Yes, sir.

Q. Who put it in first?

A. I couldn't tell you.

Q. Why did you renew it at this time?

A. There was a couple of boards getting worn on each side of it, and I renewed it with new pieces.

Q. With the exception of those boards did you make any change in it? A. No, sir.

(Testimony of John F. Smith.)

Q. Did you ever act in the capacity of tailing the edger?

A. Only for a few minutes at a time.

Q. You have been in charge of men who did, have you? A. Yes, sir.

Q. You are familiar with the work of tailing the edger? A. Yes, sir.

Q. I will ask you to state whether or not that edger pit at the time that Goodwin was working there was a safe place in which to work, or for a man tailing the edger to stand and perform his work?

A. I consider it safe.

Q. What was the custom of the mill in regard to having one or more men to work tailing the edger, tending to the edger?

A. The custom of the mill is to have one man do the work.

Q. Can one man perform that work?

A. Yes, sir.

Q. Did he do it right along? A. Yes, sir.

Q. Do you know the length of that edger-table, Mr. Smith? A. Yes, sir.

Q. Do you know how far it is from the edger to the last roller of the table?

A. From the last roller on the edger to the last roller on the table is 21 feet.

Q. I ask you if an 18-foot board could come through that edger and reach this end of the edger-table, or the end of it in front of the tailer of the edger, without being held by the edger rollers. Would it be loose from the edger?

(Testimony of John F. Smith.)

A. When it passed the—

Q. When it reached this end of the table?

A. Yes, it would be free from the edger.

Q. With what force do boards, after leaving the edger, travel on those rollers along the table?

A. Just what force their own heft gives them on the rolls.

Q. What is the fact as to whether they are easy or difficult to stop by the hand?

A. You can stop them with your hand.

Q. Where a man is tailing the edger at that edger-table is there any necessity in the performance of his duty for him to turn his side to the edger, towards the edger, and stoop over towards the back roller, in order to keep the refuse or the edgings or tailings from accumulating?

A. No, sir, it isn't necessary for him to turn his side and stoop over the table.

Q. Now, I will ask this: If a person stands in the position between where the two boards come down the edger-table, is it possible for a board coming down on the right-hand side to strike him in the body if he takes the position that is left there for him in the edger pit?

A. It would be very possible for it to strike him; it might brush him on the side if he stood in his position, but it would be an extra wide board.

Q. Would it strike him with sufficient force to injure him in any way?

A. I don't think that it would.

Q. Now, suppose that a man while tailing that

(Testimony of John F. Smith.)

edger should turn with his right side towards the edgers and stoop over with his hand near the rollers behind him, stand on one foot and raise his right leg until his knee is on a level with the surface of the edger-table, and an 18-foot board were to come out of the edgers and down the table and strike him in the knee-joint, the inside of the knee-joint, on the right-hand side, would it have force enough to drag or push him up against this roller so as to injure his knee?

A. If he turned his right side to the edger?

Q. Yes, sir.

A. I don't think it would strike him with force enough to pin him in there; it might push him over the rolls if it got a square strike at him; I don't see how it could pin him in there.

Q. If it would push him against the roller, the roller would carry him over, would it? Do you know where the filing-room is? A. Yes, sir.

Q. Do you know how far the lower door, or nearer door of the filing-room is from the edger pit?

A. The lower door?

Q. Yes.

A. I don't know just the exact distance. It is in the neighborhood of 90 or 100 feet; I don't know just the exact distance.

Q. Have you been in that filing-room often?

A. Yes, sir.

Q. I will ask you if you know whether that sawmill was being run at its full capacity during the time that Goodwin worked there? A. It was.

(Testimony of John F. Smith.)

Q. At the time he was working tailing the edger?

A. Yes, sir.

Q. Is it possible for a man sitting on a bench in that filing-room to hear a man standing in the edger pit scream or holler while that mill is running in full force, full blast?

A. I hardly think he could be heard with the mill running at full capacity; I don't see how.

Q. Can a man stand in either of the doors of that filing-room and see a man in the edger pit?

A. I think you can stand in the closest door to the pit and see a man.

Q. Can you see all of him?

A. No, not all of him.

Q. What part would you see?

A. His shoulders and head would be about all you would see, if you could see him at all; I never noticed in particular as to that, but you couldn't see more than his shoulders and head anyway—the edger would come in line; it is too high to give you the sight.

Mr. McFARLAND.—Your Honor, it is five o'clock, and I am not through with this witness.

(Here an adjournment was taken to ten o'clock A. M., Saturday, May 22, 1909.)

Court met at ten o'clock A. M., Saturday, May 22d, 1909, pursuant to adjournment, all parties being present, and the following proceedings were had, to wit:

(Testimony of John F. Smith.)

JOHN F. SMITH, recalled for further direct examination, on being examined by Mr. McFarland, testified as follows:

Q. Mr. Smith, have you ever had any experience in the construction of sawmills such as the one of the defendant in this case? A. Yes, sir.

Q. How much experience have you had in that line?

A. A dozen different mills, as near as I can call to memory, that is, constructing and repairing.

Q. Covering how many years?

A. About fifteen years.

Q. Now, are you familiar with all of the machinery, workings, and mechanism of this sawmill?

Q. Yes, sir.

Q. What have you to say in regard to its being standard, up-to-date machinery?

A. It is standard machinery in the mill, standard, up-to-date machinery in the mill now.

Q. I will ask you to describe this edger-box, the dimensions of it.

A. It is two and a half by five feet.

Q. How deep?

A. At present, two feet nine inches.

Q. How deep was it at the time, if you know, when Goodwin was tailing the edger?

A. Two foot seven inches.

Q. I wil ask you to state whether or not, if this table was lengthened, it would render the place where the man who tails the edger stands safer to work in or not, if the table was longer, the edger-table?

(Testimony of John F. Smith.)

A. No, sir, it wouldn't make it any safer.

Q. I will ask you to state whether or not the edger pit is of sufficient size and dimensions for a man to stand in with safety to himself tailing the edger? A. It is large enough.

Q. I will ask you to state whether or not, in your opinion, the edger-table or the edger pit, or the appliances could be constructed differently, or in such manner as to make it more safe for the edger-tailer to work in or about.

A. No, sir, I don't consider that it would be constructed to make it any safer than it is.

Q. I believe you stated yesterday that the siding of the edger-table back of the edgerman was not changed, but merely repaired.

A. That is all; the shape of it hasn't been changed, only repaired.

Q. In your opinion, as a sawmill man, and from your knowledge of this edger-table and the surroundings and the transfer chain back of the edger-table, I will ask you to state whether it would be possible for a man tailing the edger to reach back and take edgings or refuse from the transfer chain after it passed over the edger-table, after the edgings had passed over the edger-table.

Mr. McBEE.—I object to that as immaterial; there is no contention that such was done.

The COURT.—The objection is overruled. Answer the question.

A. No, sir, a man couldn't reach from where he

(Testimony of John F. Smith.)

stands over to the transfer table and pick up an edging.

Mr. McFARLAND.—Would it be possible for tailings, edgings, coming through the edgers to accumulate back of the edgerman except upon this transfer chain, which takes them away, unless they would get caught in a roller?

A. The couldn't accumulate behind him on the transfer chain without being conveyed away.

Q. Well, now, I will ask you to state how rapidly this transfer chain back of the edger-table back of the last roll of the edger-table, conveys the tailings and edgings.

A. At the rate of about 150 feet a minute.

Q. That is about as fast, as rapidly, as the edger-table conveys the boards after they are released from the edger, is that it?

A. Very nearly as fast, yes, sir.

Q. I will ask you to state whether or not witness F. W. Bellis worked in the sawmill during the year 1907? A. 1907?

Q. Yes, sir.

A. No, sir, he didn't work in the sawmill in the year 1907?

Q. You know Mr. Bellis, don't you?

A. Yes, sir.

Q. Do you know his general reputation in the community in which he resides for truth and veracity? A. Yes, sir.

Q. Is it good or bad? A. It is bad.

(Testimony of John F. Smith.)

Cross-examination.

(By Mr. McBEE.)

Q. How long have you known that reputation of Mr. Bellis?

A. I have known of it by hearsay ever since I have known him?

Q. You say he didn't work in the mill in 1907?

A. No, sir.

Q. Did you work there in 1907?

A. Yes, sir.

Q. What time in 1907, did you begin work there?

A. I begun work in 1907 when the reconstruction or repair work of the mill commenced.

Q. Your work was principally night work, wasn't it? A. Not in 1907, no, sir.

Q. When was your work night work?

A. 1906.

Q. Did you work at night work in 1908?

A. No, sir, not for steady work; I worked a few nights in 1908, I guess, a few of them.

Q. In what capacity were you working in 1907?

A. Millwright.

Q. Working days? A. Yes, sir.

Q. When you were working nights what was your work? A. I was in charge of the mill.

Q. In what capacity were you working?

A. I was overseeing the management of the mill, in charge of the mill in general throughout.

Q. When did you commence that work?

A. It was early in July; I don't remember just

(Testimony of John F. Smith.)

the date, but early in the month of July I commenced that work.

Q. When was the last time that Bellis worked in the mill?

A. He quit working in the mill either in the month of July or the very first of August; I couldn't give the exact date, in 1906.

Q. What was he working at when he was there?

A. He was grinding saws on the night shift.

Q. Don't you know as a fact that he was grinding saws on the night shift in 1907?

A. Grinding saws on the night shift?

Q. He was assisting the saw filer in 1907?

A. No, sir; he was not.

Q. Who was the saw filer in 1907?

A. Frank Hill.

Q. Who was the saw filer when Bellis worked there? A. Frank Hill.

Q. Do you know Mr. Beebee, who was an employee in the mill at that time?

A. I know Mr. Beebe that worked in the office.

Q. He is the man with the artificial hand?

A. Yes, sir.

Q. Was he working there in 1907?

A. Yes, sir.

Q. I call your attention to the year 1907, when did the mill commence running nights?

A. It didn't run nights in 1907?

Q. It didn't run nights at all in 1907?

A. No, sir.

Q. Isn't it a fact that this incline that you speak

(Testimony of John F. Smith.)

of in the pit was put in by you on Sunday, shortly after Goodwin got hurt? A. No, sir.

Q. And that the morning after it was put in you had a conversation with Mr. Bellis about it in which you called his attention to the fact that you had put in an incline in the pit—.

A. No, sir, there never was—

Q. —and didn't you say to Mr. Bellis on that occasion, after telling him what you had done, that "nobody can get caught in there and hurt now; it is fixed so that it would push him up on to the table behind?"

Mr. McFARLAND.—If the Court please, I object to that question, because it shows upon the face of it that it is intended as an impeaching question, and the proper foundation hasn't been laid for it.

The COURT.—Sustained.

Mr. McBEE.—This conversation I refer to occurred on the Monday after such repairs were made, in the mill, nobody present but yourself and Mr. Bellis, and the time was in June, 1907; I renew the question.

The COURT.—Do you understand the question?

The WITNESS.—I would like to have the question restated.

(Question read by stenographer.)

The WITNESS.—That is the question you want answered?

The COURT.—Yes.

A. No, sir; there never was such conversation between I and Mr. Bellis.

(Testimony of John F. Smith.)

Mr. McBEE.—You say that you consider this a safe place to work?

A. I consider that it is safe, yes, sir.

Q. A safe place to work? That is what you mean, is it? A. Yes, sir.

Q. And you say that in putting an inexperienced man to work there it is not necessary to warn him of any danger?

Mr. McFARLAND.—I object to that, if the Court please, as not proper cross-examination.

The COURT.—Sustained.

Mr. McBEE.—An exception.

Q. Do you consider it sufficiently safe that it would not be necessary for the employer to warn an inexperienced person going to work there to do that work from any danger?

Mr. McFARLAND.—I make the same objection, if the Court please.

The COURT.—Overruled.

A. I wouldn't consider that it was necessary to warn a man.

Mr. McBEE.—Don't you know, as a matter of fact, that the way that pit was constructed, and that edger-table was constructed, and the mill operated at that time, that there was great danger of boards from the edger catching a man working in the pit and pushing him out on the table behind?

A. Not if he works in the place that is prepared for him to work, there isn't great danger.

Q. The place prepared is the pit, isn't it?

A. Yes, sir.

(Testimony of John F. Smith.)

Q. And isn't there danger that a man standing in that pit, doing that work, may be caught by boards coming from the edger, and pushed out onto the table behind?

A. No, sir; there isn't danger of a man being caught and pushed out behind, not from that table.

Q. Do you know whether or not that was ever done in that pit, place? A. It has been done.

Q. When the conditions were the same as at the time Goodwin worked there?

A. The conditions of the table were the same.

Q. How many boards can be put through the edger at one time? A. Two.

Q. One on each side? A. Yes, sir.

Q. Can you put one on top of another and put them through?

A. They don't edge in that way.

Q. I am asking you what they can do.

A. They can, yes.

Mr. McFARLAND.—I object to that as not proper cross-examination, and I ask to have his answer stricken out.

The COURT.—The objection may be considered as having been made opportunely. It is overruled.

Mr. McBEE.—How many boards, one on top of the other, can be put through the trimmer-saw and trimmed at one time?

A. Through the trimmer-saw and trimmed?

Q. I mean the edger.

A. You can put two inch boards through, one on

(Testimony of John F. Smith.)
top of the other, one-inch boards, one on top of the other.

Q. No more?

A. Pretty hard matter to get more than that through an edger by an edgerman that will do his work.

Q. You say that if the pit was farther from the edger it would be no safer place to work?

A. No, sir, I don't consider that it is any safer to work, if it was farther away from the edger.

Q. How far is it from the edger-saw to the farther side of the pit? A. From the edger-saw?

Q. Yes.

Mr. McFARLAND.—You mean rollers, don't you?

Mr. McBEE.—All right; from the rollers?

A. From the last roller on the edger to the last roller on the pit is 21 feet.

Q. If a board 22 feet long, or boards 22 feet long were being run through the edger, would there be any more danger of those catching the workman in the pit than shorter boards?

Mr. McFARLAND.—I object to that for the reason that it is not proper cross-examination, and for the further reason that the plaintiff, in his testimony, did not claim that this board which he says struck him was more than 18 feet long. There is no testimony that any board of the length exceeding 18 feet struck him or injured him.

The COURT.—It is my impression, gentlemen, that all of this testimony is immaterial, that is, testimony on this particular point. There is no alle-

(Testimony of John F. Smith.)

gation in the complaint charging negligence of this character against the defendant. I will say to you now that the Court will instruct the jury that there is no negligence on the part of the defendant in providing a reasonably safe place to work; the Court will be compelled to give that instruction. Inasmuch as counsel went into this matter however, you may pursue it a little further, but I didn't notice that counsel was going into it until after he had asked several questions, and you may pursue it further if you desire to.

(Question read by a stenographer.)

A. No, sir.

Q. Did you have anything to do with employing or discharging men about the mill?

A. Not since 1906.

Q. Did you see Goodwin at work there?

A. Yes, sir.

Q. Did you see any one helping him?

A. Yes, sir.

Q. Will you tell me why, if that is a safe place to work, and one man can easily do the work without danger and without instruction, that he was given a helper?

A. It requires a certain amount of skill there, or a man must get accustomed to the kind of work that he is doing; it is a pretty busy place when small stuff is coming through that edger.

Q. In your examination this morning you were asked something about the transfer chain, and you answered in regard to the transfer-table back of the

(Testimony of John F. Smith.)

pit on which edgings might pile up. Now, in order to clear that matter, do you mean to say that it is not possible to reach back from the pit to the table behind the pit to remove edgings, or not possible to reach back and remove them from the chain behind the pit?

A. It isn't, not for a man to stand in the pit and reach back on this transfer-table I refer to—a man can't do it.

Q. Let's understand that. Let me have those photographs. I hand you Defendant's Exhibit "A," on which there is a straight mark indicating the pit in which the workman stands, and ask you first if you recognize that as a photograph of the defendant's mill at Coeur d'Alene in which this accident is alleged to have occurred.

A. Yes, sir, I recognize it as a photograph.

Q. The very front portion of the photograph represents, does it not, this table?

A. This represents the table here, the front portion of that photograph there represents the edger, the edging-machine; this portion of it here represents the table that you have referred to; this is the pit here.

Q. Let me mark them the figure two. I am asking now what does the figure two represent?

A. That represents the transfer table that I am speaking of, this here.

Q. I now ask you if a man standing in the pit can lean over and reach edging that might be piled on the table which I have marked 2?

(Testimony of John F. Smith.)

A. Well, now, that will depend somewhat on the height they are piled, if they were piled up there two feet high a man could stand up there and reach them; if they are on the table he can't reach them.

Q. Could he, by leaning over and resting his body against the rollers?

A. He can't lean over there and rest his body on the roller when the mill is in operation.

Q. Why?

A. He will get transferred from the pit out here.

Q. How much lower is the transfer-table than the edger-table?

A. Twenty-four inches, this portion of it, here.

[Testimony of Dr. John T. Woods, for the Defendant.]

Whereupon said witness was excused and thereupon Dr. JOHN T. WOODS was called, sworn and testified on behalf of defendant, as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. You may state your name in full.

A. John T. Woods.

Q. Where do you reside?

A. Coeur d'Alene, Idaho.

Q. What is your occupation?

A. Physician.

Q. Physician and surgeon? A. Yes, sir.

Q. How long have you been a practicing physician? A. Five years.

Q. Where did you graduate from, Doctor?

(Testimony of Dr. John T. Woods.)

A. Detroit College of Medicine.

Q. Is that a regularly recognized and chartered institution of medicine and surgery? A. It is.

Q. When did you graduate?

A. May 5, 1904.

Q. Have you been licensed by the State Board of Examiners? A. I have.

Q. To practice your profession in this State?

A. I have.

Q. And how long have you practiced your profession altogether? A. Five years.

Q. I will ask you to state if you have had any experience in treating cases of osteomyelitis.

A. I have.

Q. Have you had any experience in treating cases of periostitis? A. I have.

Q. Will you describe the former of those diseases, describe the disease of osteomyelitis.

A. Osteomyelitis is a suppuration occurring in the marrow of the bone.

Mr. McBEE.—What is that doctor?

A. A suppurative inflammation occurring in the marrow of the bone, to put it simply.

Mr. McFARLAND.—What is periostitis?

A. A suppurative inflammation occurring in the periosteum or fibrous covering on the outside of the bone.

Q. I will ask you to state whether, from your experience and knowledge as a physician and surgeon, it is possible for a person to have osteomyelitis pro-

(Testimony of Dr. John T. Woods.)

duced from injury or cut upon the knee or knee-joint, after wound has entirely healed?

A. No, sir.

Q. I will ask you the same question in regard to periostitis.

Mr. McBEE.—I don't think that periostitis enters into this controversy at all. I object to it.

Mr. McFARLAND.—There is some testimony in regard to it, I believe.

Mr. McBEE.—If the Court please, I remember now that the testimony was that the periosteum in its natural condition was white like an egg, but in this instance it was inflamed. I wish to withdraw my statement as to my recollection of the testimony. But that was the only statement he made. I don't care to withdraw my objection, but my admission.

The COURT.—The objection then will be overruled.

Mr. McBEE.—An exception.

(Question read by stenographer.)

A. No, sir.

Mr. McFARLAND.—Now, if osteomyelitis was produced by an injury, bruise or cut to the knee would that cut or wound heal? A. No, sir.

Q. I will ask you to state what is your opinion in regard to periostitis, under the same conditions.

A. The answer would be the same—no, sir.

Q. Are you acquainted with Mr. L. W. Bellis?

A. Not personally acquainted.

Q. You know him by sight, do you?

A. Yes, sir, I know him by sight.

(Testimony of Dr. John T. Woods.)

Q. He lives there in Coeur d'Alene?

A. Yes, sir, so I believe.

Q. I will ask you if you know his general reputation in the community in which he resides for truth and veracity? Do you know it, Doctor?

A. By hearsay, yes, sir.

Q. What is it—good or bad? A. Bad.

Cross-examination.

(By Mr. McBEE.)

Q. Doctor, how many cases of osteomyelitis have you treated?

A. I should judge about half a dozen, without my records to look at, I should judge about that.

Q. Have you performed operations for that disease? A. Some.

Q. Amputations?

A. No, sir—well, amputation for the tubercular form once.

Q. It is sometimes called tuberculosis of the bone, this same disease?

A. Or tubercular osteomyelitis.

Q. What causes that disease?

A. Which disease?

Q. Either or both? A. Infection.

Q. What causes the infection?

A. It would be the action of one of two varieties of germs; they might be introduced either from the outside or might infect the bone through the blood—infection from without or within.

Q. Can you state whether or not that disease

(Testimony of Dr. John T. Woods.)

might be primarily caused or superinduced by a bruise? A. Yes, sir, it might.

Q. And you state that if the wound healed, after the wound had healed there would be no danger of osteomyelitis? A. None.

Q. Would it be possible in a case of that kind, however, for the skin to heal and leave the ravages of the disease to spread and the soreness in the bone to remain? A. It would not.

Q. Why so?

A. Because with bone infection there is no healing until the infection is removed.

Q. How long does it take this disease to develop?

A. That would depend upon the nature of the injury and the condition of the patient, that is, the power of the patient's resistance; it might develop in two or three days, or it might take two or three years.

Q. It might take two or three years or two or three months? A. Yes, sir.

Q. Would it be possible for a person to receive a bruise, say on the arm, and no laceration of the skin whatever, but a severe bruise or subjected to a steady pressure, and without laceration of the skin, to cause a condition which would develop this disease?

A. Yes, sir, it would be possible.

The COURT.—There is one question I desire to ask the Doctor. I fear I don't exactly understand your answers. You say that this disease might result from a wound or pressure where the skin is not broken?

(Testimony of Dr. John T. Woods.)

A. Yes, sir; in that case the infection would be carried to the point of lower resistance through the blood; the infection would not go in through the skin. It would simply mean that there would be an area of low resistance, causing the infection to be more readily planted there through the blood. In itself, if the patient's powers of resistance were good, it wouldn't necessarily imply that there would be any added danger of osteomyelitis, but with any point of low resistance, even without infection, the point may be infected, and is more likely to be infected, through the blood stream, or, in other words, through pus germs carried there accidentally through the blood streams. It would be a second type of infection; infection may come either from within or without. The bruise would simply act as a predisposing cause in that case to the osteomyelitis, not as a direct cause.

[Testimony of H. M. Strathern, for the Defendant (Recalled).]

Whereupon said witness was excused and thereupon H. M. STRATHERN was recalled on behalf of the defendant and testified as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. Mr. Strathern, I believe yesterday you stated that you are familiar with the machinery and workings of the Coeur d'Alene Lumber Company's sawmill, and that you had had experience in the construction of timber-mills. Now, I will ask you to state, from your experience as a sawmill man and your knowledge and observation of the Coeur d'Alene Lumber

(Testimony of H. M. Strathern.)

Company's sawmill, and particularly the edger-table, edger-pit and the machinery and appliances connected therewith, whether in your opinion the edger-table or the pit or the machinery immediately connected therewith, or by which they are operated, could have been constructed so as to have rendered them safer for a man working in the capacity of tailer of the edger than they are and were constructed?

A. I would require to answer that in two ways, Mr. McFarland. If it is the wish of the Court that I answer it two ways—

The COURT.—Yes, answer it.

A. As I suggested once to Mr. Humbird—

Mr. McFARLAND.—That isn't in evidence.

The COURT.—I don't know what you mean by answering it in two ways. You needn't enter into the matter of conversations with anybody else. Just give your judgment. If your judgment depends upon two different conditions, you can give your conclusions, assuming each condition to exist.

A. One of my answers will be that I think that the way that it is constructed it is perfectly safe; but to guard against an accident, which I never seen an accident there, to guard against one, if necessary, there could be a piece of iron put around there so as nothing could get at the man.

Mr. McFARLAND.—Is that ever done in sawmills? A. Never.

Q. I will ask you to state if you know L. W. Bellis, the witness who appeared here in this case?

A. I know him.

(Testimony of Herman Salscheider.)

Q. Do you know where he resides?

A. Yes, sir.

Q. How long have you known him?

A. About five years.

Q. Do you know his general reputation in the community in which he resides for truth and veracity? Do you know that? A. It is not good.

Q. Answer it, yes, or no. Do you know his general reputation? A. Yes.

Q. Is it good or bad? A. It is bad.

[Testimony of Herman Salscheider, for the Defendant (Recalled).]

Whereupon said witness was excused and thereupon HERMAN SALSCHEIDER was recalled on behalf of defendant and testified as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. Mr. Salscheider, did you hear Mr. Bellis' testimony? A. I did.

Q. I will ask you to state what is the fact as to whether at any time while he was working there in the sawmill, or just after you directed or advised him to go to the hospital, or advised him to go to the office and get a check entitling him to go to the hospital?

A. Mr. Bellis?

Q. I mean Mr. Goodwin? A. I did not.

Q. I desire that question to apply to Mr. Goodwin. I will ask you to state whether or not Mr. Bellis worked in that sawmill during the year 1907?

A. He did not.

(Testimony of Herman Salscheider.)

Q. I will ask you to state whether or not, from your experience in constructing sawmills and from your knowledge of the construction of the Coeur d'Alene Lumber Company's mill, its machinery, and particularly the edger-table and the edger-pit, it could have been constructed in a different manner so as to render it safer to a man working in that edger-pit, tailing the edger? A. It could not.

Q. I will ask you if you know Mr. L. W. Bellis?

A. I know of him, and what little I met him around the mill is all.

Q. How long have you known him, or known of him?

A. When I first came to the mill, three years ago.

Q. Do you know his general reputation in the community in which he resides for truth and veracity?

A. I have always heard that it was bad.

Q. Do you know it?

A. All I could say is what I have heard; I don't know much about him.

Q. I will explain, Mr. Salscheider—

Mr. McBEE.—He has already said that it was bad; let his answer stand.

Mr. McFARLAND.—Very well.

[Testimony of Patrick F. McGovern, for the Defendant.]

Thereupon said witness was excused and thereupon PATRICK F. McGOVERN was called, sworn and testified on behalf of the defendant, as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. What is your full name?

A. Patrick F. McGovern.

Q. Where do you reside?

A. Coeur d'Alene, Kootenai County, State of Idaho.

Q. How long have you lived there?

A. Five years.

Q. What is your occupation or business?

A. Chief of police of the city of Coeur d'Alene.

Q. How long have you held such position?

A. About five years.

Q. Are you acquainted with L. W. Bellis?

A. Yes, sir.

Q. Do you know where he resides?

A. Yes, sir.

Q. How long have you known him?

A. About five years.

Q. Do you know his general reputation in the community in which he resides for truth or veracity?

A. I do.

Q. Is it good or bad? A. It is bad.

Cross-examination.

(By Mr. McBEE.)

Q. Are you and Mr. Bellis pretty good friends?

(Testimony of T. C. Hahn.)

A. I don't know any reason we shouldn't be.

Q. I am asking you as to the fact, whether you are? A. Why, yes.

[Testimony of T. C. Hahn, for the Defendant.]

Whereupon said witness was excused and thereupon T. C. HAHN was called, sworn and testified on behalf of the defendant, as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. You may state your name in full.

A. T. C. Hahn.

Q. Where do you reside, Mr. Hahn?

A. Coeur d'Alene, Idaho.

Q. What is your occupation?

A. Head bookkeeper for the light company.

Q. How long have you held such position?

A. Going on three years.

Q. Are you acquainted with L. W. Bellis?

A. I am.

Q. Do you know where he resides?

A. Yes, sir.

Q. Do you know his general reputation in the community in which he resides for truth or veracity?

A. I do.

Q. Is it good or bad? A. Bad.

Cross-examination.

(By Mr. McBEE.)

Q. Where do you reside in Coeur d'Alene, with reference to where he lives?

A. He lives in Coeur d'Alene; I don't know the exact place he lives.

(Testimony of T. C. Hahn.)

Q. Do you live in the same ward?

A. I think I do.

Q. You have met in little political gatherings in the same ward?

A. Not in political gatherings, no, sir.

Q. Caucuses? A. No, sir.

Q. Did you ever have any difficulty with Mr. Bellis, any trouble with him in any way?

A. No, not that I recall.

Q. Mr. Bellis was active once in a political caucus in your ward, where you were active with another faction? A. In my ward?

Q. Yes. A. No, sir.

Q. You don't remember anything about that?

A. No, sir.

Whereupon said witness was excused.

Mr. McFARLAND.—Now, if the Court please, I have a stipulation here which was entered into by counsel for plaintiff and myself, and which I desire to have read into the record. It is to save the trouble of introducing documentary testimony in regard to the defendant having complied with the State laws—

Mr. McBEE.—I admit that paragraph.

Mr. McFARLAND.—It is hereby stipulated and agreed by and between plaintiff and defendant in this action that at all the times mentioned in the complaint and answer herein, the defendant had complied with the Constitution and all of the laws of the State of Idaho in respect to nonresident or foreign corporations doing business in this State, and was authorized to do business in the State of Idaho, and had filed cer-

(Testimony of L. W. Bellis.)

tified copies of its Articles of Incorporation, and had designated an agent upon whom process issued out of the courts of the State of Idaho may be served, as required by the statutes of the State of Idaho. I might file this with the clerk. The defendant closes.

The COURT.—Is there any rebuttal?

Mr. McBEE.—Yes. Call Mr. Bellis.

[Testimony of L. W. Bellis, for the Plaintiff (in Rebuttal).]

Thereupon L. W. BELLIS was recalled by plaintiff in rebuttal and testified as follows:

Direct Examination.

(By Mr. McBEE.)

Q. Mr. Bellis, do you know when the incline was fixed in this pit which Goodwin was working in at the time he got hurt?

Mr. McFARLAND.—I object, if the Court please, as going into their case anew; the matter has been gone over by Mr. Bellis before; it is repetition, and not strictly rebuttal.

The COURT.—Overruled. Answer the question.

A. Yes, sir, I do.

Mr. McBEE.—Just state the circumstances.

A. When it was done?

Q. Yes, and what you know about it.

A. It was changed on the first Sunday after the mill started up nights; on a Saturday night we changed—the last time we changed saws was about three o'clock—

Q. Never mind that.

(Testimony of L. W. Bellis.)

A. And I finished up the filing of those two saws, and I didn't have any more filing to do—

The COURT.—Let's not go into that.

Mr. McBEE.—Was that incline in that night?

A. Yes, sir.

Q. Was the incline there that night?

A. No, sir, it wasn't there that night.

Q. When did you return to the mill?

A. I returned Monday night.

Q. When you returned on that Monday did you have any conversation with Mr. Smith, the millwright? A. Yes, sir, I did.

Q. About this incline? A. Yes, sir.

Q. What was said by Mr. Smith?

The COURT.—Well, that wouldn't be proper, would it?

Mr. McBEE.—Well, Mr. Smith has denied the conversation.

The COURT.—Yes, but counsel is aware of the rule as to the manner of propounding questions, etc.

Mr. McBEE.—Did you observe a change in the condition of the pit? A. I did.

Q. Who called your attention to it?

A. He called my attention to it.

Q. Who? A. Mr. Smith.

Q. What did you observe as to the change in its condition? A. I asked him—

Q. What did you observe as to what change, if any, had been made in the condition of the pit?

A. I see that the incline of that pit had been put in there.

(Testimony of L. W. Bellis.)

Q. Did he say to you at that time that he had put in an incline there, and that a man could not be caught there now and hurt by a board, but if he were caught it would push him out on the table behind? Did he say that? A. He says—

Mr. McFARLAND.—I object. I ask that the witness be required to answer the question yes or no.

A. He did; he did say that.

Cross-examination.

(By Mr. McFARLAND.)

Q. When did you have this conversation with Mr. Smith?

A. This was the last conversation, was on Monday night.

Q. This was in 1907?

A. The first conversation was on Saturday night.

Q. Both conversations were in 1907?

A. Yes, sir.

Q. What month?

A. Well, that was the first Sunday after the mill started up nights.

Q. What month was that?

A. I am not able to tell whether it was in July or June, but I think it was in June.

[Testimony of George Goodwin, for the Plaintiff (in Rebuttal).]

Whereupon said witness was excused and thereupon GEORGE GOODWIN was recalled in rebuttal by plaintiff, and testified as follows:

Direct Examination.

(By Mr. McBEE.)

Q. George, you have heard the testimony of Mr. Amsbaugh that on the 30th and 31st of May, 1907, you worked in the Lewis Lumber Company's mill. State whether or not you did work there on that day.

Mr. McFARLAND.—I object, if the Court please, as the witness has already answered that question; it is simply repetition.

The COURT.—Sustained.

Mr. McBEE.—State whether or not you at any time worked in the planing-mill in the Lewis Lumber Company's mill.

A. No, sir; never worked day in a planing-mill in my life.

Q. You heard the testimony of these witnesses about the incline of the pit. State whether or not that incline was there when you worked there, and when you got hurt? A. No, sir,

Mr. McFARLAND.—I object to that as opening the case anew, not being in rebuttal; that was a part of his case in chief.

The COURT.—Sustained.

Thereupon said witness was excused.

Mr. McBEE.—We rest.

Mr. McFARLAND.—If the Court please, I desire to make a motion at this time.

Now, at this time, plaintiff and defendant having both closed the evidence on both sides of the case, comes the defendant, and moves the Court for an instruction to the jury to render a verdict in favor of the defendant in this action, for the reason that the plaintiff, as a matter of law, has no cause of action against the defendant, and the further reason that the evidence in this case is insufficient to warrant the jury in finding a verdict in favor of the plaintiff and against the defendant, and hereby moves for such instructed verdict upon all of the grounds and all of the reasons heretofore stated and specified specifically in defendant's motion for a nonsuit herein, as well as upon the grounds and for the reasons in this motion above stated.

The COURT.—I think, gentlemen, I shall adhere to the conclusion heretofore stated. The motion will be overruled.

To which ruling of the Court the defendant then and there duly excepted.

The COURT.—Yes. Have you some requests for instructions?

Mr. McFARLAND.—Yes, I have, your Honor. Some I have looked at and corrected, and others I haven't. Here is one instruction that I desire to submit.

Mr. MORGAN.—We have no requests, your Honor.

Mr. McBEE.—Does the Court desire to limit the argument?

The COURT.—Not unreasonably.

Mr. McBEE.—I shall not talk unreasonably long, I think. As to instructions, your Honor, I understood that the Court usually gave instructions of its own motion, and we did not prepare any.

The COURT.—The Court will give such instructions as occur to be pertinent. Still, as a rule, if counsel desire and special instructions given, they should be tendered before you address the jury.

[Instruction Requested by the Defendant, Exception, etc.]

Thereupon R. E. McFarland, attorney for the defendant, presented to the Court the following written instruction and asked that the same be given by the Court to the jury, viz.: "Gentlemen of the jury, you are instructed to return a verdict in this case in favor of the defendant." Which said instruction was refused by the Court and the Court refused to give the same and did not give the same, to which ruling of the Court the defendant then and there duly excepted and assigned the same as error, whereupon counsel for the respective parties argued the case to the jury, and after argument of respective counsel the Court orally instructed the jury, and after the Court had instructed the jury as aforesaid, Mr. McFarland, attorney for the defendant, took the following exception to the action of the Court in refusing to give the instruction requested by defendant as aforesaid:

Now, at this time, before the jury retires to consider of its verdict in this action, comes the defend-

ant and excepts to the action of the Court in refusing to give to the jury the following instruction, number one, requested by the defendant, viz.:

"Gentlemen of the jury, you are instructed to return a verdict in this case in favor of the defendant," the exception being based upon the reasons that the testimony introduced upon the trial of the case does not justify or warrant the jury in finding a verdict in favor of the plaintiff and against the defendant; that by the testimony the plaintiff has failed to make out a cause of action against defendant; that the testimony on behalf of the plaintiff fails to prove or establish that while in the employ of the defendant he was not provided with a safe place in which to perform his labor at tailing the edger, and further that the plaintiff has failed to prove by the testimony that he was required, while in the employ of the defendant, to perform more work or labor than he or any ordinary laborer could perform, and that by reason of the failure on the part of defendant to provide plaintiff with a safe place in which to work, and in requiring him to perform more labor or work than he or any other ordinary laborer could with safety to himself perform, was injured; and there is no testimony in said cause providing or tending to prove any negligence on the part of the defendant, by which plaintiff was injured.

[Recital Relative to the Instructions of the Court to the Jury.]

Before the jury retired to consider their verdict, the Court explained to them the issues upon which they were to find, and instructed them in the law, to

which instructions, no exceptions were taken by either party.

[Order Settling, etc., Bill of Exceptions.]

I, Judge Frank S. Dietrich, one of the Judges of the United States Circuit Court for the Ninth Circuit, District of Idaho, Northern Division, being the Judge who presided in said court at the trial of the case of George Goodwin, Plaintiff, vs. Coeur d'Alene Lumber Company, a Corporation, Defendant, tried in said first named court, beginning on the 20th day of May, 1909, hereby certify that the foregoing Bill of Exceptions was presented to me by counsel for the defendant, on the —— day of ————, 1909, for settlement, and it appearing to me that the same had been, within the time allowed by law and within the time allowed by an order of the Court extending said time, served upon the attorneys for the plaintiff, together with notice that the same would be presented for settlement, and the attorneys for the plaintiff having made no objection to the settlement and having offered no amendments, and it appearing to me that the said Bill of Exceptions is correct and contains all of the evidence offered at the trial of said cause, and all of the exceptions taken by the defendant to the admission of testimony, and to the giving and refusal to give instructions to the jury, the said Bill of Exceptions is hereby settled and allowed as a true Bill of Exceptions in this case, and I hereby certify that the same, with the exhibits attached hereto and made a part hereof, contains all of the evidence produced at the trial. The clerk is directed to attach to said Bill of Exceptions and make a part

hereof, all of the original exhibits, including Defendant's Exhibits "A" and "B," inclusive.

Dated this 20th day of August, 1909.

FRANK S. DIETRICH,
Judge.

Admission of Service of Bill of Exceptions.

Service of the foregoing Bill of Exceptions, at Coeur d'Alene, Kootenai County, State of Idaho, by receipt of a true and correct copy thereof on this 21st day of July, 1909, is hereby admitted.

R. T. MORGAN,
EDWIN McBEE,
Attorneys for Plaintiff.

Stipulation for the Settlement of Bill of Exceptions.

It is hereby agreed and stipulated, by and between the plaintiff and the defendant in the above-entitled action, viz.: George Goodwin, Plaintiff, vs. Coeur d'Alene Lumber Company, a Corporation, Defendant, that the above and foregoing Bill of Exceptions is true and correct, and that the same may be signed, settled and certified by the Judge of said court at such time as he may see fit, without further notice to either party of the time or place of such settlement.

Dated this 16th day of August, 1909.

EDWIN McBEE,
R. T. MORGAN,
Attorneys for Plaintiff,
R. E. McFARLAND,
Attorney for Defendant.

Exhibit "A."

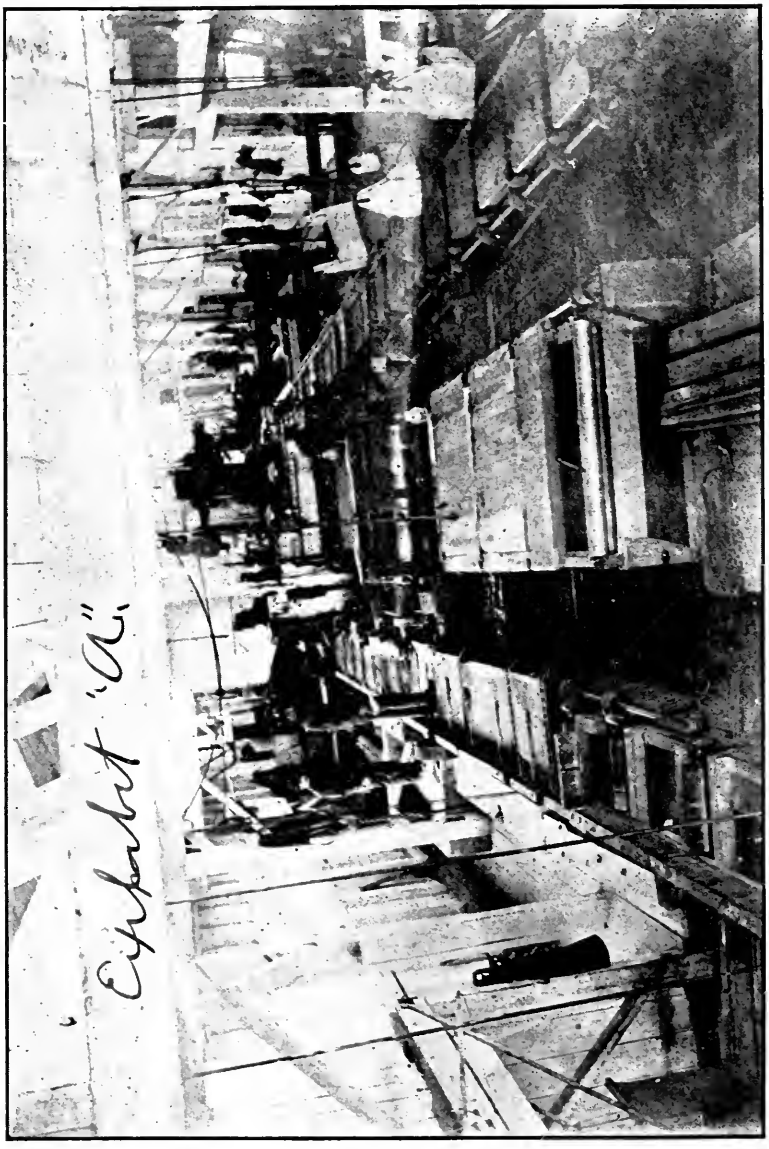
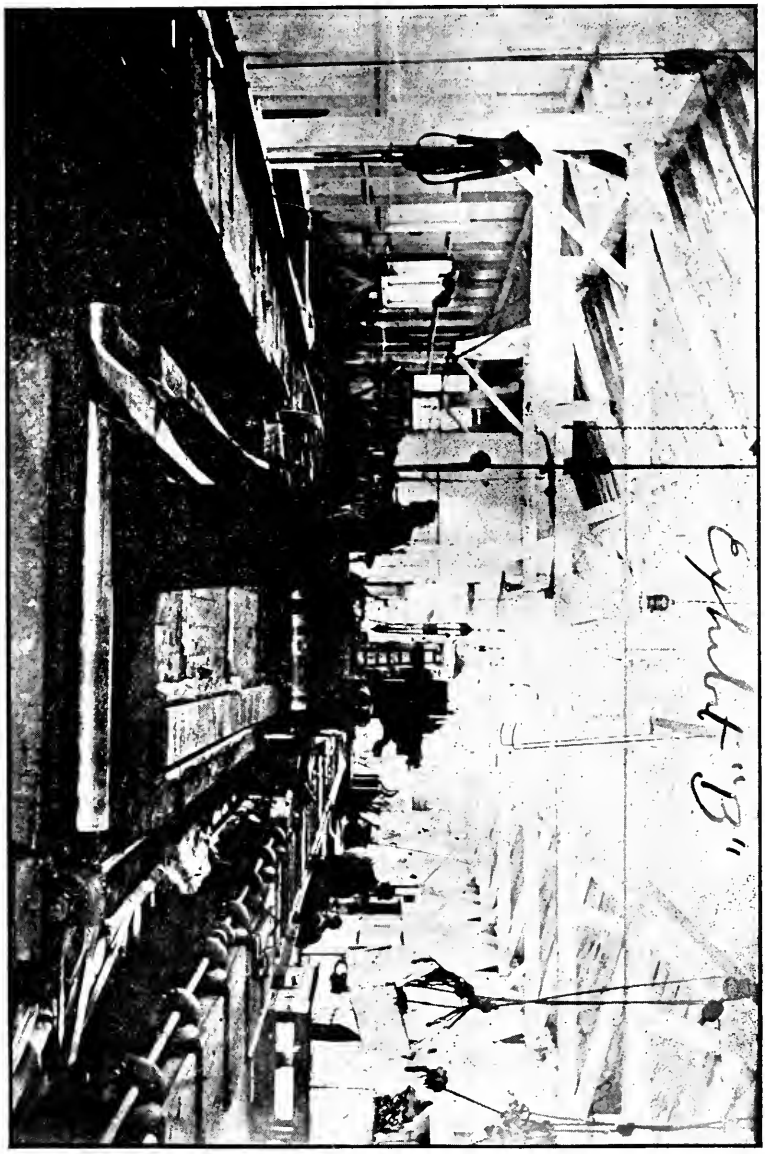


Exhibit "B."



[Endorsed]: Filed August 20, 1909. A. L. Richardson, Clerk.

[Stipulation and Order Postponing Time of Hearing of Petition for a New Trial.]

In the United States Circuit Court for the Ninth Circuit, District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

It is hereby agreed and stipulated, by and between the plaintiff and the defendant in the above-entitled action, by and through their respective attorneys, as follows:

I.

That the hearing of the petition of defendant for a new trial herein be, and the same is continued over the October term of the above-entitled court, and to such time and place as may be hereafter agreed upon by the parties hereto.

II.

That, if the parties fail to agree upon the time and place of the hearing of said petition, then the time and place of such hearing may be fixed by either party upon fifteen (15) days' notice, in writing, thereof, being served upon the adverse party.

III.

That all of the other stipulations and agreements

contained in the stipulation heretofore filed herein, and made and dated on the 25th day of June, A. D. 1909, by and between said parties, as to the hearing of said petition for a new trial, be and the same are hereby continued in full force and effect.

Dated this 16th day of October, A. D. 1909.

R. T. MORGAN,
EDWIN McBEE,
Attorneys for Plaintiff.

R. E. McFARLAND,
Attorney for Defendant.

Good and sufficient reasons appearing therefor, it is hereby ordered that the above and foregoing stipulation, and all of the conditions and provisions thereof, be and the same is hereby approved, and the hearing of the petition for a new trial herein be, and the same is hereby postponed according to the terms and conditions of said stipulation.

Dated this 18th day of October, A. D. 1909.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed October 8, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court for the District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Order Denying Motion for a New Trial.

This cause came regularly on to be heard in open court by agreement of respective counsel heretofore duly made on this 28th day of December, A. D. 1909, upon defendant's motion for a new trial herein, R. E. McFarland appearing as attorney for the defendant in support of said motion, and after argument of counsel, the Court, being fully advised in the premises, it is hereby ordered and adjudged that said motion for a new trial herein be, and the same is, hereby denied.

FRANK S. DIETRICH,

U. S. District Judge for the District of Idaho, who tried said cause and entered said judgment.

[Endorsed]: Filed December 28, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court for the District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court for the Ninth Circuit, Division of Idaho:

The above-named defendant, Coeur d'Alene Lumber Company, a corporation, conceiving itself to be aggrieved by the verdict, decision and judgment of this Honorable Court, made and entered on the 22d day of May, A. D. 1909, at Moscow, State of Idaho, in the above-entitled action, and by errors of the Court in the progress of the trial of said cause, does hereby pray for a Writ of Error from the United States Circuit Court of Appeals in and for the Ninth Circuit, to the United States Circuit Court, District of Idaho, to review said verdict, decision and judgment, and herewith files its assignment of errors and prays that a judge of said court may allow said writ and direct that a transcript of record of the proceedings upon which said judgment was entered,

duly authenticated, be sent to said Circuit Court of Appeals.

ROBERT E. McFARLAND,
Attorney for Defendant,
P. O. Address, Coeur d'Alene, Idaho.

[Endorsed]: Filed Dec. 28, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court for the District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Assignment of Errors.

The above-named defendant, in support of its petition for a writ of errors in the above-entitled cause, hereby assigns the following errors:

I.

The trial Court erred in overruling the defendant's amended demurrer to the complaint herein, because said complaint does not state facts sufficient to constitute a cause of action in that it shows upon the face thereof that if, as alleged in said complaint, defendant failed to provide plaintiff with a safe place in and at which to work, or required plaintiff to perform more work or labor than one man could safely perform, or that the work or services required

of plaintiff was dangerous, and that he sustained an injury by reason of said facts, he assumed the risk, for his complaint alleges that he had been performing said alleged dangerous work and services, in said alleged dangerous and unsafe place, and had been required to do more work than one man could safely perform, for eight days prior to sustaining said alleged injury, and must have known, or could, by the exercise of reasonable care, caution and diligence, have known, ascertained or discovered that said place and work were dangerous and unsafe, and that he was required to do and perform more work than one man could safely perform.

II.

The trial Court erred in overruling defendant's objection to the admission of any testimony in said cause on the ground, and for the reason that the complaint does not state facts sufficient to constitute a cause of action.

III.

The trial Court erred in entering judgment for plaintiff and against the defendant herein for the sum of Three Thousand Dollars ($3,000), with interest and costs, upon the verdict of the jury, and in entering the judgment on the amount of said verdict.

IV.

The trial Court erred in overruling and denying defendant's motion for a nonsuit, made herein at the close of plaintiff's testimony, because the plaintiff failed to prove a sufficient case for the jury, said motion having been made under the provisions of Section 4354 of the Revised Codes of the State of Idaho, which is as follows:

Sec. 4354. "An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

1. By the plaintiff himself, at any time before trial, upon the payment of costs: Provided, a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon;

2. By either party, upon the written consent of the other;

3. By the Court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

4. By the Court, when, upon the trial, and before the final submission of the case, the plaintiff abandons it;

5. By the Court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register. Judgment may thereupon be entered accordingly."

The plaintiff having failed to prove a sufficient case for the jury in the following particulars:

A. The complaint alleges that defendant employed plaintiff to work in its sawmill; that after having worked in said sawmill getting logs out of the water, plaintiff was put to "tailing the edger"; that the work of "tailing the edger" was dangerous work; that the place where plaintiff was directed to stand in performing said work was not large enough to

permit plaintiff or any laborer to stand therein and work or labor with safety to himself; that the work required of plaintiff was too great for one person to perform, and, in the attempted performance, was fraught with great danger to plaintiff or any person engaged in the operation of such work; that plaintiff was inexperienced in such work and was generally inexperienced and ignorant, and that while in the performance of his duties in "tailing the edger," he received an injury to his right leg at or near the inside of his knee-joint, by reason and on account of the place in which he was working being a dangerous and unsafe place to work in and at, the work being dangerous and unsafe and more than one man could perform with safety. There is an absolute failure of the testimony to show that the edger-pit or box in which plaintiff worked while "tailing the edger" was not a fit, suitable or safe place or was not such as is ordinarily used in all modern and well equipped sawmills. There was an utter failure on the part of the plaintiff to show by the testimony that said edger-pit or box, or place where plaintiff stood when performing his duties, was in any manner dangerous and unsafe to work in or at. The testimony introduced by plaintiff failed to show that the work he performed was more than one man could safely perform, but, on the contrary, shows that prior to receiving the alleged injury, plaintiff had performed said services for eight days, and after receiving said alleged injury, had performed the same labor and services for more than a day and a half. The testimony introduced by plaintiff failed to show that the

work of "tailing the edger" was fraught with danger or that it was unsafe or dangerous for plaintiff or any one else to perform said work, or that said work was in itself dangerous in character, and the testimony introduced by plaintiff failed to show that he was inexperienced or ignorant generally as alleged in the complaint.

B. The evidence introduced on behalf of plaintiff clearly shows that in the performance of his duties in "tailing the edger" he was required to stand in the edger-pit or box, facing the saws, or facing the direction from which the boards and edgings, which he was required to handle, came, and that if he received any injury at all while in the employ of defendant, it was received as testified by him, by his turning his back toward the saws and the direction from which the said boards and edgings came to him, and by raising his leg, which he claims was injured, out of the edger-box or pit on a level with his edger-table, over which said boards came and were passed, and was not injured by reason of the work being dangerous or by reason of his being required to perform more work than one person could safely perform, or by reason of the edger-pit or box being a dangerous or unsafe place in which to work; that plaintiff's own testimony shows that some of the edgings had passed by him and that he turned around, facing the opposite direction which he should face in performing his duties, raised his leg out of the edger-pit or box till his knee came on a level with the edger-table and with the boards passing thereover, and, while in that position, which was not

the correct or proper position for him to occupy while "tailing the edger," a board, in the due course of the operation of said mill, came over and along said edger-table and struck him on the inside of his knee, thereby causing the injury complained of.

C. The testimony of plaintiff shows that, before receiving the injury complained of, he had worked for defendant "tailing the edger" in the same place and under the same circumstances and conditions, for the period of eight days, and if the edger-pit or box was a dangerous place, he knew it, or if the work required of him was more than one man could safely perform, he knew it, or if the work was dangerous or hazardous, he knew it, or that by exercising of ordinary care, caution or diligence he had sufficient time in which to have learned, ascertained or discovered, and could have learned, ascertained and discovered the dangerous and unsafe condition of said edger-pit, the fact that said work and labor was more than one man could perform, and that said work and labor was dangerous and hazardous, and that by continuing in the employ of the defendant and in the performance of said work, he assumed all of the risks incident to said work and employment, if there were any.

V.

The trial Court erred in refusing to direct a verdict for defendant at the close of the whole evidence, because the evidence was insufficient to warrant the recovery by plaintiff of any sum whatever. The said evidence was insufficient in the following particulars:

1. The evidence was insufficient to warrant a verdict or judgment in any sum for the reasons stated in assignment IV.

2. The evidence was insufficient to justify the verdict in any sum, in this: The testimony fails to show that plaintiff was injured in the sawmill of defendant or was injured while in the employ of defendant; it fails to show that plaintiff was injured through any carelessness or negligence on the part of defendant while in the employ of defendant; it fails to show that at the time plaintiff claims to have been injured while in the employ of defendant, he was using ordinary care or caution, or that he was injured without any fault on his part, but by reason of the carelessness and negligence of defendant; it fails to show that defendant did not provide plaintiff with a fit, safe or suitable place in or at which to work.

3. The evidence shows that plaintiff did not receive any injury to his leg, which caused him any pain or which necessitated the amputation or loss of said leg, but that, at all of the times alleged in the complaint, plaintiff, instead of having been injured while in the employ of defendant or at defendant's sawmill, was suffering from a chronic disease or wound of the right knee and that he did not receive or sustain any injury through any carelessness or negligence on the part of defendant, in the way of an act of omission or commission.

4. The evidence shows that the sawmill of defendant, at all of the times that plaintiff was employed therein, was a modern sawmill in every respect,

equipped with modern machinery and appurtenances, and was a safe place in and at which to work.

5. The evidence shows that the edger-box or pit in which plaintiff worked was the usual edger-box or pit had and used in modern sawmills properly equipped, and was a safe place in and at which to work.

6. The evidence shows that the work required of plaintiff to perform was not more than any ordinary man could safely perform, and that one man usually performed said work, and that said work as performed by one man was not fraught with danger and was not dangerous and unsafe.

7. The evidence shows that the work, labor and services required of plaintiff were not dangerous or unsafe.

8. The testimony shows that the amputation and loss of plaintiff's leg was caused by reason and on account of disease of the bone of his leg, which could not have been caused by any injury that he received while in the employ of defendant.

9. The evidence does not show that the injury which plaintiff claims to have sustained while in the employ of defendant contributed to the disease on account of which his leg was amputated, or that it directly or indirectly brought on the condition of plaintiff's leg which required amputation.

VI.

The trial Court erred in receiving and accepting the verdict of the jury and in entering judgment thereon, for the reason that the damages returned by said verdict are and were excessive and appeared to

have been given by the jury while under the influence of passion or prejudice, in this: The jury, in arriving at the amount of its verdict, ignored the instruction of the Court, which is as follows:

"I advise you, gentlemen, that you cannot award damages to the plaintiff directly because of the loss of his leg or the amputation of his leg. There is no evidence here sufficient in character to warrant you in finding that the amputation was due to the injury which he received, if he did receive any injury, at the defendant's sawmill"; and took into consideration the amputation or loss of plaintiff's leg in assessing his damages at the sum of Three Thousand Dollars, which is excessive damages not taking into consideration the amputation or loss of said leg.

VII.

The verdict is against law in this:

a. That the jury, in arriving at its verdict, ignored the instruction of the Court last above given.

b. The jury, in arriving at its verdict, ignored the following instructions given by the Court:

"Now, in charging the defendant here with not providing a reasonably safe place to work, or rather, in not using due care to that end, the plaintiff assumed the burden of showing that such a place was not provided, and I am going to cut this matter short, gentlemen, by saying to you expressly that the evidence is insufficient to show or to warrant you in believing that the defendant was negligent in this respect. There is no evidence here that the defendant did not use ordinary care and prudence in providing a reasonably safe place for the plaintiff to

perform his duties, so that, in considering your verdict, you will discard the evidence so far as it relates to that point."

VIII.

The trial Court erred in overruling defendant's motion for a nonsuit, and in refusing to direct a verdict for the defendant, as aforesaid, and in submitting the case to the jury, for the following reasons:

1. The Court held, by its instruction first above quoted, that there was no testimony showing that the amputation or loss of plaintiff's leg was caused by any injury received while in the employ of defendant.

2. The Court, by its instruction to the jury last above quoted, held that plaintiff failed to prove any negligence on the part of the defendant in failing to provide him with a safe place in and at which to work.

3. Having held that plaintiff could not recover from defendant damages for the amputation or loss of his leg, the jury could not determine or segregate any damages which plaintiff may have sustained to his leg by reason of any injury received in the employ of defendant, separate and apart from any damage, injury or pain that he suffered by reason of the loss of his leg.

ROBERT E. McFARLAND,
Attorney for Defendant,
P. O. Address, Coeur d'Alene, Idaho.

[Endorsed]: Filed December 28, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court for the District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Order Allowing Writ of Error and Fixing [Amount of] Bond.

The defendant in the above-entitled action having this day filed in this court and presented its petition for a writ of error and its assignment of errors in the above-entitled cause, and prayed that the amount of the bond on said writ of error, as well as the amount of the bond for costs of appeal, damages and interest be fixed.

It is hereby ordered that said petition be allowed and said writ granted as prayed for, and that the amount of said bond on said writ of error be and the same is hereby fixed at Six Thousand Dollars ($6,000.00), the said bond, when executed, to operate as a supersedeas of said judgment, as well as a bond for costs of appeal, damages and interest.

Done this 28th day of December, A. D. 1909.

FRANK S. DIETRICH,

United States District Judge for the District of Idaho, who tried said cause and entered said judgment.

[Endorsed]: Filed Dec. 28, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court, Ninth Circuit, District of Idaho.

GEORGE GOODWIN,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

Bond on Writ of Error.

Know All Men by These Presents: That we, Coeur d'Alene Lumber Company, a corporation, as principal, and Frank R. Coffin and Timothy Regan, as sureties, are held and firmly bound unto George Goodwin, the above-named plaintiff, for the just and full sum of Six Thousand Dollars ($6,000.00), to be paid unto the said above-named George Goodwin, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our executors, administrators, successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 29th day of December, in the year of our Lord 1909, upon the conditions.

Whereas, lately at a session of the Circuit Court of the United States for the District of Idaho, in a suit pending in said court between the said George

Goodwin, as plaintiff, and the said Coeur d'Alene Lumber Company, a corporation, defendant, a judgment was rendered against said defendant upon the verdict of the jury in the sum of Three Thousand Dollars ($3,000.00) and costs, amounting to One Hundred Fourteen Dollars and Fifteen Cents.

Whereas said defendant, conceiving itself aggrieved thereby, has obtained from said court a writ of error to reverse and correct said judgment in that behalf and a citation directed to the said above-named plaintiff, admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within the time therein fixed;

Now, therefore, the conditions of the above obligation are such that if the said Coeur d'Alene Lumber Company shall prosecute its said writ of error to effect and answer all damages and costs if it fails to make its plea good in said court, then the above obligation to be void; otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and as a supersedeas bond.

COEUR D'ALENE LUMBER COMPANY,
Principal.
By ROBERT E. McFARLAND,
Its Agent and Attorney.
FRANK R. COFFIN, [Seal]
TIMOTHY REGAN, [Seal]
Sureties.

State of Idaho,
County of Ada,—ss.

Frank R. Coffin and Timothy Regan, the sureties whose names are subscribed to the foregoing bond, being first severally duly sworn, each for himself and not one for the other, deposes and says:

That he is a resident, householder and freeholder within the county of Ada, State of Idaho, and is well and truly worth the sum specified in said bond as the penalty thereof, over and above all of his just debts and liabilities, exclusive of property exempt from execution.

FRANK R. COFFIN.
TIMOTHY REGAN.

Subscribed and sworn to before me this 29th day of December, A. D. 1909.

BENJ. Q. PETTENGILL,
Notary Public in and for Ada County, State of Idaho.

The foregoing bond is hereby approved this 29th day of December, A. D. 1909, and the same, when filed, shall operate both as a bond for costs on appeal and as a supersedeas bond.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed December 29, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court for the District of Idaho, Northern Division.

GEORGE GOODWIN,

Plaintiff,

Praecipe for Transcript.

vs.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Defendant.

To the Honorable A. L. Richardson, Clerk of the United States Circuit Court, Boise, Idaho.

Sir: You will please prepare a Transcript on Appeal in the above-entitled case and include therein the following papers and documents, to wit:

1. The writ of error, citation, appeal bond, assignment of errors and all other papers relating to the appeal and petition for a writ of errors.
2. The judgment-roll.
3. The bill of complaint.
4. All of the orders made by the Court prior to the trial, during the trial, and subsequent to the trial.
5. All stipulations of counsel.
6. Everything else in the record in said cause, including the orders of the Court, the bonds, and every other record.

Respectfully,

ROBERT E. McFARLAND,

Attorney for Defendant,

P. O. Address, Coeur d'Alene, Idaho.

[Endorsed]: Filed Dec. 29, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Plaintiff in Error,

vs.

GEORGE GOODWIN,

Defendant in Error.

Writ of Error [Original].

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court, before you or some of you, between George Goodwin, plaintiff, and the Coeur d'Alene Lumber Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said defendant, the Coeur d'Alene Lumber Company, a corporation, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given that then under

your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, on the 28th day of January, 1910, in said Circuit Court of Appeals, for the Ninth Circuit, to be then and there held, that the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 28th day of December, in the year of our Lord one thousand nine hundred and nine.

[Seal] A. L. RICHARDSON,
Clerk U. S. Circuit Court for the District of Idaho.

[Endorsed]: (Original.) No. 418. In the Circuit Court of the United States, District of Idaho, Northern Division. George Goodwin, Plaintiff, vs. Coeur d'Alene Lumber Company, a Corporation, Defendant. Writ of Error. Filed December 28, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the Ninth Circuit, District of Idaho, Northern Division.

GEORGE GOODWIN,
Plaintiff and Defendant in Error,
vs.
COEUR D'ALENE LUMBER COMPANY (a Corporation),
Defendant and Plaintiff in Error.

Citation [Original].

The United States of America,
Ninth Judicial Circuit,—ss.

To George Goodwin, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, Calif., in said circuit on the 28th day of January, 1910, pursuant to a Writ of Error filed in the clerk's office of the Circuit Court of the United States for the District of Idaho, Northern Division, wherein Coeur d'Alene Lumber Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 29th

day of December, 1909, and of the Independence of the United States of America, the 133d.

FRANK S. DIETRICH,

District Judge.

[Seal] Attest: A. L. RICHARDSON,

Clerk.

Service by copy of the foregoing Citation hereby acknowledged this 29 day of December, 1909.

R. T. MORGAN,

EDWIN McBEE,

Attorneys for Appellee.

And thereupon it is ordered by the Court that the [Endorsed]: (Original.) No. 418. U. S. Circuit Court, Northern Division, District of Idaho. George Goodwin, Plaintiff, vs. Coeur d'Alene Lumber Company, a Corporation, Defendant. Citation. Filed on Return Jan. 3, 1910. A. L. Richardson, Clerk.

Return to Writ of Error.

foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,

Clerk.

[Certificate of Clerk U. S. Circuit Court to Transcript of Record.]

In the United States Circuit Court, Ninth Judicial Circuit, District of Idaho.

COEUR D'ALENE LUMBER COMPANY (a Corporation),

Plaintiff in Error,

vs.

GEORGE GOODWIN,

Defendant in Error.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 287, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $184.40, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said Court this 13th day of January, 1910.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 1813. United States Circuit Court of Appeals for the Ninth Circuit. The Coeur d'Alene Lumber Company (a Corporation), Plaintiff in Error, vs. George Goodwin, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Idaho, Northern Division.

Filed January 24, 1910.

F. D. MONCKTON,
Clerk.

No. 1813.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

Coeur d'Alene Lumber Company,
a corporation,
Plaintiff in error,
vs.
George Goodwin,
Defendant in error.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Northern Division.

Brief of Plaintiff in Error

R. E. McFarland, Attorney for Plaintiff in error.

No. 1813.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

Coeur d'Alene Lumber Company,
a corporation,
Plaintiff in error,
vs.
George Goodwin,
Defendant in error.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Northern Division.

Brief of Plaintiff in Error

R. E. McFarland, Attorney for Plaintiff in error.

No. 1813.

In the

United States Circuit Court of Appeals

for the Ninth Circuit.

Coeur d'Alene Lumber Company,
a corporation,
Plaintiff in error,

vs.

George Goodwin,
Defendant in error.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Northern Division.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was brought in the District Court of the First (now Eighth) Judicial District of the State of Idaho, in and for the County of Kootenai by defendant in error, as plaintiff, to recover of plaintiff in error, as defendant, the sum of Twenty Thousand Four Hundred Dollars ($20,400) damages for an alleged injury which the plaintiff claimed to have received while working in the sawmill of defendant at Coeur d'Alene, Idaho. The complaint alleges: that plaintiff was employed to work

on the log deck, and after he had worked there for a time, the foreman of defendant requested and directed him to "tail the edger,"—that is, to remove edgings or waste material from the edger; that the place provided for plaintiff in which to "tail the edger" was not of sufficient size to permit plaintiff to perform his work, and that the work required of him was more than one man was able to perform, or should have been required of one man; that the defendant failed to warn plaintiff of the danger incident to said place in which he was required to perform said services, and that by reason of these facts, and while engaged in said work, he was injured in his right leg, and that it became necessary to amputate his leg in order to preserve his life.

The complaint alleges negligence on the part of defendant in three particulars: viz, First, That defendant did not provide a place of sufficient size in which to permit plaintiff to do his work. Second, In requiring plaintiff to do more work than should be required of one man. Third, In failing to warn plaintiff of the danger incident to said place and the performance of the labor which he was required to do.

On petition of the defendant the cause was removed to the United States Circuit Court for the District of Idaho, Northern Division. A general demurrer to the complaint was filed in the State court, and an amended demurrer to the complaint was filed in the Circuit Court. The amended demurrer alleges that the complaint does not state facts sufficient to constitute a cause of action against

the defendant. The amended demurrer was overruled and denied, whereupon the defendant filed an answer, denying all of the material allegations of the complaint except the corporate existence of the defendant, and the employment by it of plaintiff, and alleging as a further and affirmative defense that, if the plaintiff was injured, as set forth in his complaint, or at all, or if the accident to the plaintiff occurred as alleged in said complaint, or at all, the conditions surrounding the same and everything in connection therewith were well known to the plaintiff at and before the time of said accident, and that all danger or hazard in connection therewith was at all times known to the plaintiff, and in accepting said employment and in performing said work, which plaintiff claimed he was performing when injured, he assumed all risks and hazards in connection therewith. In short, the affirmative answer alleges the assumption of all risk on the part of plaintiff.

The case was tried to a jury. The plaintiff was the first witness placed upon the witness stand, and, after having asked his name and age, the following question was propounded to him by his counsel: Q. "Where were you born?" and thereupon counsel for defendant made the following objection: "If the Court please, at this time I desire to interpose an objection to the admission of any testimony in the case, on the ground and for the reason that the complaint does not state facts sufficient to constitute a cause of action." The objection was by the court overruled, to which ruling of the court the

defendant then and there duly excepted. After the plaintiff, George Goodwin, and witnesses John Bennett, George Darrah and L. W. Bellis had testified on behalf of plaintiff, and counsel for plaintiff had announced that the only other witness he would call was a physician to give medical testimony, by and with the consent of the court and respective counsel, the defendant moved for a non-suit (Transcript, pages 167 to 184 Inclusive). The motion was denied, to which ruling of the court defendant then and there duly excepted, and thereupon Dr. John Busby testified on the part of plaintiff, and the plaintiff was recalled to further testify in his own behalf, after which the plaintiff rested his case and announced through his attorney that he had no further testimony to offer. Thereupon counsel for defendant renewed his said motion for a non-suit, and the same was overruled and denied, to which ruling of the court defendant then and there duly excepted (Transcript, pages 201 to 204, inclusive). The defendant then introduced testimony in defense, and at the close of all of the evidence in the case, the defendant, by its attorney, moved the court for an instruction directing the jury to render a verdict in favor of defendant for the reason "That the plaintiff, as a matter of law, has not a cause of action against the defendant, and the further reason that the evidence is insufficient to warrant the jury in finding a verdict in favor of plaintiff and against the defendant," and for the reasons and upon the grounds stated and alleged in defendant's said motions for a non-suit, which motion was denied,

and to which ruling of the court defendant then and there duly excepted (Transcript page 299). Thereupon the case was argued to the jury by respective counsel, and, after being instructed by the court, the jury retired to consider of their verdict, and subsequently returned into court with the following verdict: "We the jury in the above entitled cause find for the plaintiff and assess the damage in the sum of $3000.

Archie O. Martin, Foreman."

A judgment was entered upon said verdict, and a motion for a new trial was duly made, and thereafter heard and denied.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns and relies upon the following errors:

I.

The trial court erred in overruling the defendant's amended demurrer to the complaint, because said complaint does not state facts sufficient to constitute a cause of action, and it shows upon the face thereof that the plaintiff George Goodwin assumed whatever risk was incident to his employment, and that he was also guilty of contributory negligence.

II.

The trial court erred in overruling the defendant's objection to the admission of any evidence in said cause, for the reason that the complaint does not state facts sufficient to constitute a cause of action, and it shows upon the face thereof that the plaintiff George Goodwin assum-

ed whatever risk was incident to his employment, and that he was also guilty of contributary negligence.

III.

The trial court erred in overruling and denying defendant's motion for a non-suit herein at the close of plaintiff's testimony, because the plaintiff failed to prove a sufficient case for the jury, said motion having been made under the provisions of Section 4354 of the Revised Codes of the State of Idaho, which is as follows:

"Sec. 4354. An action may be dismissed, or a judgment of non-suit entered, in the following cases:

"5. By the court, upon motion of defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury."

IV.

The trial court erred in refusing to direct a verdict for defendant at the close of all of the evidence, because the plaintiff, as a matter of law, had no cause of action against the defendant, and the evidence was insufficient to warrant the jury in finding a verdict in favor of plaintiff and against the defendant, in any sum whatever.

V.

The trial court erred in entering judgment for plaintiff and against the defendant herein for the sum of three thousand dollars, with interest and costs, upon the verdict of the jury, and in entering judgment on the amount of said verdict.

VI.

The trial court erred in receiving and accepting the

verdict of the jury, and in entering judgment thereon, for the reason that the damages returned by said verdict are and were excessive, and appeared to have been given by the jury while under the influence of passion or prejudice, and because the jury, in arriving at the amount of its verdict, ignored the instruction of the court which is as follows:

"I advise you, gentlemen, that you cannot award damages to the plaintiff directly because of the loss of his leg or the amputation of his leg. There is no evidence here sufficient in character to warrant you in finding that the amputation was due to the injury which he received, if he did receive an injury, at the defendant's sawmill;" and took into consideration the amputation or loss of plaintiff's leg in assessing his damages, at the sum of three thousand dollars, which are excessive if the amputation and loss of plaintiff's leg is not taken into consideration.

VII.

The verdict is against law in this: that the jury ignored and disregarded the following instruction given by the court:

"Now, in charging the defendant here with not providing a reasonably safe place to work, or rather, in not using due care to that end, the plaintiff assumed the burden of showing that such a place was not provided, and I am going to cut this matter short, gentlemen, by saying to you expressly that the evidence is insufficient to show or to warrant you in believing that the defend-

ant was negligent in this respect. There is no evidence here that the defendant did not use ordinary care and prudence in providing a reasonably safe place for the plaintiff to perform his duties, so that, in considering your verdict, you will discard the evidence so far as it relates to that point."

ARGUMENT AND AUTHORITIES.

The first and second errors assigned relate to the action of the court in overruling defendant's amended demurrer to the complaint, and in overruling defendant's objection to the admission of any testimony, and may be considered together.

The material allegations of the complaint, in so far as negligence is attempted to be charged, are as follows: The foreman of defendant requested and directed plaintiff, an employee of defendant, to change from working on the log deck to "tailing the edger" in defendant's sawmill; that, in doing this work, he was required to stand in a space about two feet wide and three feet long, at the rear of the edger table; that this place was not large enough to permit plaintiff or any laborer to stand therein and work or labor with safety to himself, and that defendant knew this; that the work plaintiff was doing was dangerous and too great for one person to perform; that plaintiff was twenty-six years of age but had not had ordinary experience and did not have ordinary knowledge of the dangers incident to and connected with the operation of sawmills in general, or of said work in particular; that he had not the ability to

appreciate the dangers thereof; that defendant knew that said work was dangerous and that the labor was too great to be performed by one ordinary man in safety; that defendant failed to instruct plaintiff as to the dangers attendant upon such work, or to inform him of the dangerous places in which he was required to work, or of the fact that more work was required of him than could be safely performed by one laborer; that while plaintiff was performing his said duties and exercising reasonable care and caution, his right leg was caught by a board passing from the edger table, and fastened and pinioned between the board and another table beyond the edger table and the place where he was stationed; that his leg was caught and injured by reason of the negligence and carelessness of defendant in not providing a place of sufficient size for plaintiff to stand, and in requiring plaintiff to do more work than should be required of one man, as well as on account of failure of defendant to warn plaintiff of the danger incident to said place and the performance of said labor; that the board which caught plaintiff's leg was very wide and filled a large portion of the space provided for plaintiff to stand in and left no remaining room sufficient for plaintiff to stand in and perform the labor required of him; that plaintiff did not understand or appreciate the danger of said position and said labor, and was not at any time warned thereof by defendant; that defendant was aware of said danger and of the inexperience and ignorance of plaintiff; that plaintiff had been employed

for eight days "tailing the edger" as aforesaid when he was injured (Transcript pages 11 to 17 inc.).

The complaint charges negligence on the part of the defendant in three particulars only, viz:

First. That defendant did not provide a place of sufficient size to permit plaintiff to do his work.

Second. In requiring plaintiff to do more work than should be required of one man.

Third. In failing to warn plaintiff of the danger incident to said place and the performance of the labor which he was required to do.

The complaint shows that the work of plaintiff was the usual and ordinary work of removing edgings and waste material from the boards which came from the edger in defendant's sawmill, and that plaintiff had been engaged in this work for eight days before he was injured, and it clearly appears from the complaint that whatever dangers existed were open and obvious to any man or ordinary intelligence, and that the danger of being struck by a board coming along the edger table was one of such open and obvious dangers.

Where such facts appear by the complaint, the rule established is that the employee will be held, as a matter of law, to have assumed the risks of the employment.

Where an employee is not placed by the employer in a position of undisclosed danger, and is a mature man, he assumes the risk of the employment and no negligence can be imputed to the employer for an accident to him therefrom.

Kohn v. McNulta, 147 U. S. 238, 37 L. Ed. 150.

An allegation that it was defendant's duty to warn plaintiff, and a failure to do so, without an allegation of the facts from which it appeared that the duty existed, was insufficient.

Fortin v. Manville Co., 128 Fed. 642.

In affirming an order sustaining a demurrer to the complaint, the Supreme Court of Washington said: "When it plainly appears, as it does in this case, that the party who was injured could see and appreciate the peril to which he was exposed by his employment, it must be concluded, as a matter of law, that he accepted such peril as an incident to his employment."

Bullivant v. City of Spokane, 45 Pac. 42.

In a very recent case the Supreme Court of Idaho, in affirming a judgment sustaining a demurrer to the complaint, stated: "It is clear from the allegations of the complaint that whatever risk there was in said employment was assumed by the plaintiff, and that the trial court did not err in sustaining the demurrer and entering the judgment of dismissal."

Revised Codes of Idaho. Sec. 4178.

Goure v. Storey et al., 105 Pac. 794

Flaherty vs. Butte Ry. Co., 107 Pac. 416.

The servant assumes the risk of injury from transitory dangers arising from the changing conditions of the work, against which it is impracticable to warn.

I Dresser Employers' Liability, page 415, par. 91.

"It will be noticed that, in the majority of cases where the court has held as a matter of law that the risk was incidental to the business, it has determined the fact upon

its own knowledge of the operation or character of the business, without evidence upon the subject."

1 Dresser Employers' Liability, p. 414, par. 90.

Shields vs. Johnson, 85 Pac. 972 (Idaho Case.)

OR A NON-SUIT.

The third error assigned herein is that the trial court erred in overruling the motion of defendant for a non-suit. The reasons and grounds upon which said motion was based are clearly and sufficiently stated in the motion (Transcript page 169), and in the third assignment of error set out in the transcript (pages 311 to 315 inc.).

However, in support of this assignment, defendant calls the attention of this honorable court to the following:

The complaint charges the defendant with negligence: first, in failing to provide a place of sufficient size to permit plaintiff to do his work; second, in requiring plaintiff to do more than should be required of one man; third, in failing to warn plaintiff of the danger incident to said place and the performance of the labor required of him.

It may be remarked that the only theory on which the trial court permitted the case to go to the jury was that, with the knowledge on the part of defendant that plaintiff was inexperienced, he was put to work at a place which obviously entailed some danger, without warning thereof. (Transcript pages 182 to 184 inc.). The ruling and remarks of the trial court upon the motion for a non-suit clearly indicate that the court was of the opinion that the evidence was insufficient to sustain the allegation

that the defendant did not provide plaintiff a safe place in which to work, and the court so instructed the jury.

Taking the testimony, introduced on behalf of plaintiff, it shows that he was twenty-six years of age, that prior to the injury complained of he was a healthy, robust, strong young man who could do any kind of labor. He had worked hard from the time he was fourteen years old; had worked for two winters around the coal docks in Wisconsin, on a log hoist at Coeur d'Alene, Idaho, on a wood machine connected with a sawmill, and, immediately prior to the time of his alleged injury, had worked for eight or nine days "tailing the edger" in defendant's sawmill. A boy of seventeen or eighteen years old assisted him for the first day or two after he commenced to tail the edger. The plaintiff testified that the place where he was stationed at the time of the accident was about three feet square and about two feet high (Transcript page 78). L. W. Bellis, one of his witnesses testified that it was three feet by about four feet and two and one-half feet deep, with perpendicular sides, roller and cross piece; that the distance between the end of the edger table, near plaintiff's station, and the edger saw was about sixteen feet—maybe eighteen feet (Transcript pages 141 and 142.) Bellis also testified that the pit in which plaintiff worked was too close to the edger, and that there should have been an incline in the back part of the pit(Transcript page 148 and 149). These facts were not alleged or charged in the complaint and the court refused to permit the plaintiff to amend. (Transcript

pages 179 to 184 inc.).

It is a well settled rule of law that in actions for damages for negligence, the **allegata** and **probata** must correspond. Where a plaintiff avers that the negligence of defendant consisted of one thing, then proves negligence consisting in some thing else, he cannot be allowed to recover.

VI Thompson on Negligence, par. 7471.

Plaintiff testified that, in performing his work, he stood at the end of the edger table, removing the edgings from the boards which passed on each side of him, close by both legs. That he faced the edger saws and threw the edgings off as they came along the edger table with the boards, to the right and to the left, and that a whole lot of edgings came out together, and a few boards probably, and that, as he stooped over to the left to get the edgings and was pushing them off the table, a board on the right side of the table caught his right leg and jammed it up against the roller in the rear; that the board struck him right at the knee joint of the right leg on the under and inside; that he had turned around to the left to catch the edgings and had to lean over to do so (Transcript pages 78 to 82 inc.). In answer to a question as to what caused the unusual rush of tailings at the time of the accident the plaintiff stated, "Sometimes a whole lot of long ones come and they break off." Plaintiff had his back toward the edger and towards the oncoming boards. He testified that the boards came straight across the roller and that he raised up his right leg when

he stooped over. The board hit him on the inside of the knee (Transcript page 100 to 103 inc. and 118 and 119).

The measurement of plaintiff's leg to the joint of the knee was twenty inches. He was about five feet, eleven inches tall. He was standing on his left leg when he was caught by the board (Transcript pages 117, 118 and 122).

For the purpose of facilitating the application of the well established rules of assumption of risk to the facts of this case, I beg to submit the following without an extended citation of authorities in support thereof:

1. The servant assumes the risk of dangers naturally incidental to the business in which he is engaged. In deciding whether the servant assumes the risk of the injury, the court must find whether the cause of the accident was one natural to the business, and, if so, the plaintiff's knowledge and consequent assumption of it are presumed.

2. The servant assumes the risk of injury from transitory dangers arising from the changing conditions of work against which it is impracticable to warn.

3. He assumes all risk of injury arising from the existing condition of affairs, however dangerous that condition may be; provided that, (a) he knows and appreciates the danger; (b) or in the exercise of reasonable care would know and appreciate it; (c) and if the danger is obvious he is held to know and appreciate it.

As to such dangers the master owes no duty to the servant.

4. The servant is presumed to have knowledge of all

dangers caused by the manner in which the business is conducted or by the existing condition of affairs which he might have known through the exercisee of reasonable care.

5. He assumes the obvious risks. These are, dangers of such a character that the servant, either through the common knowledge he is presumed to possess, or through the intelligence and experience it appears that he has, must have known and appreciated, or have been guilty of contributary negligence in failing to know and appreciate them.

6. Where the general danger is known or ought to be known to the servant, particular details which merely enhance the danger need not be known.

I Dresser Employers' Liability, par. 90 to 98 inc.

Where the elements of danger are obvious to a person using due care, it would be unreasonable to require an employer to warn his employee to avoid dangers which ordinary prudence ought to make him avoid without warning.

Stuart v. West End St. Ry. Co., 163 Mass. 391.

Crown v. Orr, 140 N. Y. 450.

A servant of mature years and of experience is charged by law with knowledge of obvious dangers, and of those things that are within common observation and according to natural law. The master need not give warning of possible danger of which both parties have equal knowledge.

Miss. Riv. Logging Co. v. Schneider (C. C. A.) 74

Fed. 195.

Where the dangers are obvious, such as can be seen and known by ordinary care and prudence in the use of the senses, it is held that the master need not advise his servants of their existence and instruct them as to the necessary means of avoiding them, since they, equally with himself, are held to know both the fact of the peril and how to avoid it.

Holland v. Tenn. C. I. & R. Co., 19 Ala. 444.

Lewisville & N. R. Co., v. Banke, 104 Ala. 508.

One cannot say that he did not know obvious dangers.

Glenmont Lumber Co. v. Roy, (C. C. A.) 126 Fed. 524.

St. Louis Cordage Co. v. Miller, (C. C. A.) 126 Fed. 495.

There is no evidence to support the first charge of negligence against the defendant, namely, that it did not provide a place of sufficient size in which to permit plaintiff to do his work. Plaintiff testified that the place where he was stationed was three feet square and about two feet high. Bellis, the other witness who testified upon this point for the plaintiff, stated that it was about three feet by four feet and about two and one-half feet deep from the floor to the top of the edger table. The trial court properly found that plaintiff had failed to prove that this was not a safe place to work, and so instructed the jury.

There is no evidence in support of the allegation of the complaint charging defendant with negligence in requiring plaintiff to perform more work than should be re-

quired of one man. Plaintiff testified that the first day or two that he worked at "tailing the edger," a boy of seventeen or eighteen years of age assisted him, and the trial court, in passing upon the motion for a non-suit, stated that he assumed such "assistance was given because he was green in the work and it was perhaps to help him a little by way of instruction, and also by a little assistance until he was familiar with it." (Transcript page 176).

There was no evidence in support of the allegation of the complaint that it is the custom in mills of the capacity of defendant's sawmill to have more than one man employed to do the work required of plaintiff. There was no evidence to show that more than one man had ever been employed at such work, except for the first day or two during which plaintiff was engaged thereat.

There was no evidence in support of the allegation of the complaint that the "flesh, muscle, tendons, bones and bloodvessels of plaintiff's said right leg were bruised, wounded, lacerated and mangled in a most shocking and painful manner, and the cords and ligaments of said leg were so bruised, cut and mangled that plaintiff was forced to quit said employment."

There was no evidence to show that "The board which caught plaintiff's leg, as aforesaid, was a very wide board and came across said table and projected and filled a large portion of the space provided for plaintiff to stand in and left no remaining room sufficient for plaintiff to stand."

The only evidence in the record to support the allegations, "That plaintiff did not understand or appreciate the danger of his position and of his labor, or that he had not the ability or understanding to know and appreciate the dangers of said position or even common ordinary dangers incident to and in connection with the operation of sawmill machinery and of machinery in general, or that he knew no more about said machinery or any machinery than a child of the age of fourteen years and of ordinary intelligence," is the evidence of plaintiff that he told defendant's foreman that he had never worked in a sawmill, and the following question and answer: Mr. McBee. Q. "Did you know, at the time you were injured, that this was a dangerous place to work?" A. "No, sir." On this point the trial court said, "In the light of the intelligence with which the plaintiff has testified, the court couldn't adopt the theory suggested in the complaint, and suggested by counsel, that he is of simple and childlike mentality; the plaintiff has shown, I think, at least the usual, if not unusual, intelligence upon the witness stand." (Transcript pages 183 and 184).

As hereinbefore stated, the only theory on which the trial court permitted the case to go to the jury was the alleged failure of the defendant to warn plaintiff. In the face of the instructions subsequently given to the jury, stating that plaintiff had failed to prove that defendant did not furnish him a safe place in which to work, it is difficult to say on what theory the trial court proceeded. It needs no argument, evidence or authority

to support the statement that almost every kind of work around a sawmill is attended with some danger. If these dangers are open and obvious to a person of ordinary intelligence (and there is nothing in the record to show that plaintiff was not a man of ordinary intelligence) why should plaintiff not be held to have assumed the risk of these dangers? The rule is that the master need give no warning as to such risks.

Plaintiff was standing at the foot of the edger table. Boards came along on each side of him on rollers and passed him on their way to the trimmer table behind him. With these boards came the edgings, cut off by the edger saws, and his work was to take the edgings on each side of the board and throw them over the side of the edger table—on the right side when the boards came on his right, and on the left side when the boards came on his left, and the edgings would then be carried away on the slasher chains running along the floor under the edger table. His duties required him to face the edger saws from which the boards and edgings came. The board which struck him came straight across the roller, as has been above shown. There is no evidence to show that this particular board, or any board ever swerved from a straight course along each side of him. There is no evidence that this board or any board ever came directly towards the closed-in space in which he was required to work. There is no allegation in the complaint, and no evidence to show that any care should have been used or was necessary to prevent boards from coming

directly from the edger to the place of his work.

It is utterly impossible to ascertain from the evidence of plaintiff just how the accident complained of did or could have occurred. In attempting to describe it plaintiff testified that a lot of edgings came out together on his left, and that he stooped over to get the edgings, and was pushing them off the table when the board struck his right leg in the hollow of his knee joint; that he had to lean over to catch these edgings; that he turned right around to catch them and that the board did not hurt his other leg. As to what caused the unusual rush of tailings he stated that sometimes a whole lot of long edgings came and broke off.

Plaintiff was a man of about five feet, eleven inches tall. The measurement from the floor to his knee joint was twenty inches. Assuming that he was leaning over towards the left of the edger table and completely or partly turned around, with his back towards the edger saws, no one can tell from the evidence just how the board, which he claims struck him, could pinion his right leg to the roller on the trimmer table in the rear of his place of work, without touching or injuring the left leg. Assuming that the space provided for him in which to stand was three feet wide, and that he was leaning over to the left with his right foot raised, it is impossible to conceive how a board coming along on the other side of the edger table could strike him in the manner he stated or otherwise.

Applying some of the ordinary rules of assumption of

risk, which I have already stated, to the facts above outlined, it will at once appear that there were no extraordinary dangers attached to the work at which plaintiff was engaged. The only danger of which defendant could possibly be held to have been negligent in failing to warn, was the danger of being struck by a board coming from the edger. Plaintiff had seen these boards coming from the edger for eight days; he had handled the edgings from these boards for the same period of time. He did not testify as to how fast or how frequently the boards and edgings came, but it is matter of common knowledge, of which this honorable court will take judicial notice, that, in a large sawmill such as that of defendant, the plaintiff was obliged to handle the edgings from hundreds of boards every day. To say that the danger of being struck by the moving boards was not an open and obvious one, which a person of even medicore intelligence would ordinarily see and appreciate, or to say that the ordinary conditions under which the business of defendant was conducted at this particular place, and its ordinary risks and hazards were not known to plaintiff would be directly at variance with common knowledge.

It matters not by which of the well established rules I have herein stated, the facts of this case are measured. By each and all of the rules stated plaintiff is effectually precluded from any recovery herein, and I respectfully submit that each and all of said rules are applicable to the facts in this case and therefore the motion for a non-

suit should have been granted. It is a self evident proposition that if defendant provided a safe place for plaintiff in which to work, no duty devolved upon the defendant to warn the plaintiff of any danger incident to or connected with the place of work.

Glenmont Lumber Co. v. Roy, (C. C. A.) 126 Fed. 524.

St. Louis Cordage Co. v. Miller, (C. C. A.) 126 Fed. 495.

CONTRIBUTARY NEGLIGENCE OF PLAINTIFF.

Admitting, for the sake of argument, that the evidence does not show beyond all peradventure of a doubt that plaintiff assumed the risks in this case, it is sufficient to show that he was guilty of contributary negligence. Plaintiff's work required him to stand at the foot of the edger table, facing the edger saws, from which the boards and edgings came. His own testimony shows that he turned away from the saws and had his back towards them and his right knee raised on a level with the edger table when the board struck him. It is impossible to determine how his right leg could have been struck when he was leaning over to the left side of the edger table, and it is also impossible to conjecture how his right leg could have been extended far enough back towards the right hand side of the edger table to receive the injury claimed in the manner stated. This argument is made on the assumption that plaintiff's testimony as to the width of the "pit" is correct, but it was subsequently shown that his testimony on this point was

erroneous. Assuming that the board in question came straight over the roller, as testified by plaintiff, the only way in which his right leg could have been injured was for him to have extended it to the right side of the edger table, and, if he did this, it was physically impossible for him to have been reaching over to the left side of the table, or to have been leaning over that side at the time the board struck him.

THE MOTION FOR A DIRECTED VERDICT.

The fourth error assigned is that the trial court erred in refusing to direct a verdict for the defendant, at the close of the whole evidence.

My argument in support of my contention that the court erred in denying defendant's motion for a non-suit applies here, and in addition thereto I respectfully submit the following reasons why the court should have directed a verdict for the defendant. The exact dimensions of the space in which plaintiff was working at the time of his injury were five feet and one inch from side to side, by two feet and six inches from the end of the edger table to the end of the trimmer table, in plaintiff's rear. Its depth was two feet seven inches from the floor to the top of the roller. There is a plank on the edger table which caused the boards coming from the edger to work up to the roll and go straight over the roll. The side of the edger pit back of the edgerman is slanted. After the boards leave the edger they die off. If they should strike a man there would be no force. There would be nothing to the force of the board.

Witness Strathern, an experienced sawmill man, testified that the place in which plaintiff was standing was a safe place to work; that the mill of defendant was thoroughly modern and well equipped (Transcript pages 218 to 224 inc.). The boards go through the edger one by one on either side of the tailer and if the man uses judgment the tailings do not come out in great volume and run over onto the table back of the edger, where a person uses ordinary care in "tailing the edger." This edger pit is certainly large enough for a man to stand in and tail the edger with safety to himself. (Transcript page 224).

Erick Ostblom testified that the foreman put him to work helping Goodwin for a few days until he got used to it. Defendant's foreman testified that he asked plaintiff if he would care for the job of "tailing the edger" at $2.75 a day, and he told him that he would give him a boy to help him for two or three days until he got used to the job. He told him when he began to work there that the only danger was that the boards would catch him and shove him out of the hole (Transcript pages 247 and 249); that defendant never had two men to tail the edger either before or since that time; that one man can tail the edger right along (Transcript page 251); that if the pit was larger it would be unsafe (Transcript page 256). A board eighteen feet long would be clear of the press rollers in the edger by the time it reached the end of the edger table. After an eighteen foot board leaves the edger, coming down the edger table, there is no force

to the board. The man "tailing the edger" has the same length of time to throw the edgings off as the edgerman has to get the board.

It would not be possible for an eighteen foot board to strike a man "tailing the edger" if the man should turn with his right side toward the length of the table and towards the edger, and stoop down, with both hands on the back of the edger table, and raise up his right leg until his knee was level with the surface of the edger table—that is, strike him with enough force to cause an injury, because the board is out of the press rollers (Transcript pages 256 to 258 inc.). Defendant's foreman, Salscheider, testified that the first time he learned that Goodwin was hurt was about two weeks after the plaintiff left the mill, and that Goodwin then told him that he had been at the hospital two weeks (Transcript page 264). The other witnesses for defendant, who were working at the mill at the time of the alleged injury, and who were in a position that they could see whether or not plaintiff was injured, stated that they did not know of any such accident (Transcript pages 232, 233 and 240).

Bearing on the probability of plaintiff's having been injured at the time he testified, and the proof of defendant's contention that there is no casual connection shown between the injury claimed to have been received and the subsequent pain, suffering, and finally the amputation of his leg, I call the attention of this honorable court to the fact that, for five months or more, immediately after the alleged injury, plaintiff was almost continuously engaged

in hard manual labor. He quit work for about ten minutes after he was hurt, and then returned to work, and worked for the remainder of the day, and all of the next day, and until noon of the following day (Transcript pages 105 and 106). He spent about two or three days in the hospital and about a week in his room, then he worked two weeks for the B. R. Lewis Lumber Co., sweeping saw-dust and hauling boards (Transcript page 109). The time keeper for the B. R. Lewis Lumber Co. testified that on May 30 and May 31st plaintiff was working in the sawmill of the B. R. Lewis Lumber Co., taking care of the timbers coming from the saw on the live rollers; that he worked for the same company on June 13th, 14th and 15th in the planing mill; that this work was of such character as to require a good man to perform it (Transcript pages 209 and 210); he then worked for forty-five days or two months, according to the testimony of another witness, chopping down trees, sawing them and peeling the bark off. He then worked about seven days at St. Joe, running a donkey engine. He then worked about fifteen days for the Rose Lake Lumber Co., loading sawlogs on flat-cars. He then worked about fifteen days at St. Maries, assisting to move a house, and engaged in other manual labor. He then worked from five to eight days sawing logs in the woods near St. Maries.

Dr. Busby, who amputated his leg, testified that an examination of the bone of his leg, after amputation, showed that the bone was decomposed; that the disease from which plaintiff suffered was known as **osteomyelitis**;

that he could not tell exactly what was the cause of the disease; that the fact that the leg had been previously injured would predispose it to such attack; that if any particular bone in his anatomy had been injured previously, and the person was going to have an attack of that nature, it is very likely that the injured part would be the part that would be involved; that the disease of **osteomyelitis** is an acute disease, or one that comes on suddenly; that it really is an erysipelas of the bone; that it is not very common for this disease to originate or be caused directly from a bruise; that he would not be willing to say that the injury to plaintiff's leg was the cause of the attack of **osteomyelitis**; that he had no absolutely definite idea just what was the cause of the attack; that if plaintiff was going to have an attack of this kind, such an injury might possibly predispose it to the same, as a person with some light lung trouble would be more likely to have an attack of pneumonia than a person who didn't have; that the disease could well exist without any injury to the leg, and was often due to exposure; that getting thoroughly chilled was the commonest cause—for instance, if one over-exerts himself, gets to sweating, sits down in the woods or outside and gets thoroughly chilled; that where a person on the 3rd, 4th or 5th of June, 1907, should receive such an injury to his knee, as described, of sufficient seriousness and graveness to result in **osteomyelitis**, the disease would develop earlier than the following November; that it would come on within twenty-four hours; that plaintiff came to his hospital in

November (Transcript pages 189 to 194 inc.).

From a review of the testimony it may well be said that there is considerable mystery surrounding the manner of the accident. The mystery does not grow any clearer in the light of plaintiff's subsequent work at various kinds of hard labor for the period of more than five months, especially when we consider the evidence of Dr. Busby, who amputated his leg, and who refused to state that the bone disease of the leg which made the amputation necessary, was attributable to the injury for which recovery is sought in this action.

The trial court found that plaintiff failed to prove that defendant had not furnished him a safe place in which to work, and that there was no negligence on the part of defendant in providing a reasonably safe place to work. If the place furnished was a safe place, it follows that there were no dangers of which defendant was obliged to warn plaintiff, and from this last conclusion it necessarily follows that plaintiff cannot recover anything from the defendant, and that therefore, the motion for a directed verdict should have been granted.

THE VERDICT.

The fifth and sixth errors assigned, viz., that the trial court erred in entering judgment for plaintiff and against the defendant for the sum of $3000, with interest and costs, upon the verdict of the jury, and in entering judgment upon the amount of said verdict, and that the trial court erred in receiving and accepting the verdict of the jury and in entering judgment thereon, for the reason that

the damages returned by said verdict are and were excessive, and appeared to have been given by the jury while under the influence of passion or prejudice, and because the jury, in arriving at the amount of its verdict, ignored the instruction of the court that they should not take into consideration any damages because of the loss or amputation of plaintiff's leg, may be considered together.

I have above shown by the testimony of Dr. Busby, one of plaintiff's witnesses, that no casual connection is shown between the injury complained of and the amputation of plaintiff's leg, nor was it shown, except by the plaintiff's self serving evidence, that he suffered any considerable pain by reason of said injury. While I recognize the rule that for pain and suffering there can be no measure of compensation, save the arbitrary judgment of the jury, another rule is equally entitled to recognition, viz: That the damages awarded by a jury should not be excessive, and the court should not receive a verdict where the damages are plainly excessive. I am willing to concede that, if the jury had been permitted to take into consideration the amputation of plaintiff's leg, $3000 would have been a small sum, provided that plaintiff had made out his case. The court limited the jury to a consideration of the pain and suffering of the plaintiff from the time of the injury to the date of the amputation of his leg, which would be a period of less than six months. It will be remembered that, during all of that period, the plaintiff was engaged at hard manual labor,

and that many of the witnesses who saw him during that time, and for whom he worked, never heard him complain and never noticed that he walked lame.

The seventh error assigned is that the verdict is against law in that the jury ignored and disregarded the instruction of the court, charging them that there was no evidence that the defendant did not use ordinary care and prudence in providing a reasonably safe place for the plaintiff to perform his duties, and that, in considering their verdict, they should discard the evidence in so far as it relates to the charge of negligence on the part of defendant in having failed to provide plaintiff with a reasonably safe place in which to perform his duties.

The argument above made, and the authorities above cited in support of the third and fourth errors assigned apply here, and I take it that no further argument or citation of authorities is necessary.

In conclusion I respectfully submit:

First: That the trial court found that plaintiff had failed to prove that defendant was negligent in furnishing him a safe place in which to work.

Second: That there was an utter failure on the part of plaintiff to show that plaintiff was required to do more work than should be reasonably required of one man.

Third: That, if there were any dangers attached to the work of plaintiff, or to the place at which he was required to work, such dangers were open and obvious to any man of ordinary intelligence, and plaintiff offered no testimony to show that he was not a man of ordinary

intelligence.

Fourth: That the risk of being struck by a board coming from the edger table was a risk naturally incidental to the business in which plaintiff was engaged, and he therefore assumed such risk.

Fifth: That the danger of being so struck was a transitory danger arising from the changing conditions of the work at which plaintiff was engaged, and therefore it was impracticable for defendant to warn plaintiff thereof.

Sixth: That, if such danger was not obvious, plaintiff in the exercise of reasonable care, and considering the length of time at which he was engaged at such employment, would be bound to know and appreciate such danger.

Seventh: That, if he did not know of such danger, he was guilty of contributary negligence in failing to know and appreciate it.

Eighth: That defendant, having furnished plaintiff a safe place in which to work, did not owe him any duty to warn him against obvious dangers.

Ninth: Plaintiff was employed to "tail the edger." He was not instructed, nor was he expected to attempt to recover tailings after they had passed beyond him and onto the trimmer, and it was not possible for him to do so. The man working at the trimmer was there for that purpose and it would have been his duty to have attended to any tailings escaping from the edger table into the trimmer table, and it is unreasonable to presume that

plaintiff believed for a single moment that he could recover any tailings which had passed beyond him, onto the roller or trimmer table, back of him. If we take testimony of plaintiff as true, he is absolutely precluded from a recovery in this action. Even if an unusual quantity of tailings came out, it was his duty to stand at his post and face the edger saws and the direction from which the boards and tailings came, and the moment that he shifted his position and turned his back upon the edger saws and the direction from which the tailings and boards came, and leaned to his left, and raised his right knee on a level with the edger table, he took the dangerous instead of the safe way provided by the master, and created a dangerous condition over which the master had no control and against which the master could not safeguard.

Thompson on Negligence (White Supp.) par. 4698.

Jennings v. Tacoma Ry. & Motor Co., 34 Pac. 937.

Groth v. Thomann et al, 86 N. W. 178.

McAuley v. Casualty Co., 96 Pac. 131.

Respectfully submitted,

R. E. M'FARLAND,

Attorney for Plaintiff in Error, P. O. Address, Coeur d'-Alene, Idaho.

No. 1822

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STEAMSHIP COMPANY (a corporation), claimant of the American Steamship "Santa Rita", her tackle, apparel and furniture, and all persons intervening for their interests therein,

Appellants,

vs.

A. SCHILLING & COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

CHARLES PAGE,
EDWARD J. McCUTCHEN,
SAMUEL KNIGHT,
Proctors for Appellants.

Filed this.....day of March, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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A. SCHILLING & COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

Inasmuch as this case is precisely similar to the case numbered 1821, now pending in this court, entitled United Steamship Company (a corporation), claimant of the American Steamer "Santa Rita", etc., appellant, v. Thomas Haskins and Max Schwabacher, partners doing business under the firm name of Leege & Haskins, appellees, except as to the amount of coffee involved, and

as these two cases have been considered together by appellant in its brief filed in that case, it respectfully refers the court to such brief, and asks that it may be considered also the brief in the case first above entitled.

Respectfully submitted,

CHARLES PAGE,
EDWARD J. MCCUTCHEN,
SAMUEL KNIGHT,
Proctors for Appellant.

No. 1813

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

COEUR D'ALENE LUMBER COMPANY, A CORPORATION,
Plaintiff in Error
vs.
GEORGE GOODWIN,
Defendant in Error

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Northern Division.

BRIEF OF DEFENDANT IN ERROR

R. T. MORGAN,
EDWIN McBEE,
Attorneys for Defendant in Error.

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vs.
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Defendant in Error

No. 1813

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE

Defendant in error will not make a formal statement of the case but will adopt that contained in the brief of plaintiff in error. In the discussion of the several assignments of error, however, counsel will make more or less extended references to the testimony and particularly on the argument as to the sufficiency of the evidence to justify the verdict and judgment.

Argument and Authorities.

The first assignment of error relates to the action of the court in overruling the demurrer to the complaint, but that ruling is not open to review because not made a part of the record by bills of exception and no exception is shown to have been taken to the ruling.

Dietz vs. Lymer, 61 Fed. 792.

England vs. Gebhardt, 112 U. S. 502.

Rodriguez vs. U. S., 198 U. S. 165.

Ghost vs. U. S., 94 C. C. A. 253; 168 Fed. 841.

It may be contended, however, that the second assignment of error properly preserves an exception going to the sufficiency of the complaint. The defendant in error at this time refers to the opinion of the trial court on his order overruling the demurrer (Transcript. pages 36 and 37) as containing proper reasoning to be applied to the question there raised as to the sufficiency of the complaint.

This is not an ordinary case of personal injury. The accident occurred, according to the allegations of the complaint, from a combination of circumstances; the ignorance and inexperience of the plaintiff, he being required to do more than one experienced man could do, and not being provided with a safe place for the performance of his labor. An intelligent man of long experience might have appreciated and realized each of the last named dangers, but even that would not relieve the defendant of the duty of of providing a safe place for its employees to work.

Re. Cal. Navigation and Improvement Co., 110 Fed. 670.

Western Union Telegraph Co. vs. Tracy, 114 Fed. 282.

Beaque vs. Hosmer, 169 Mass. 541.

Western Stone Co. vs. Muscial, 63 N. E. 664.

When one who is known to be inexperienced is put to work on dangerous machinery, the employer is bound to give him such instructions as will cause him to fully understand the danger attending the employment and the necessity for care.

Verdelli vs. Gray's Harbor Co., 47 P. 364.

An employer who fails to exercise ordinary care in providing reasonably safe appliances is charged with knowledge of any defect therein whereby an employee is injured.

U. P. Ry. Co. vs. James, 56 Fed. 1001, 6 C.C. A. 217

The duty devolves upon the master employing in a dangerous occupation a servant, who from youth, *inexperience, ignorance or want of general knowledge* may fail to appreciate the danger, to first instruct and warn him so that he may comprehend the danger and do the work safely.

Jones vs. Min. Co., 28 N. W. (Wis.) 207.

Husey vs Taaffe, 12 N. E. (N. Y.) 286.

Prentiss vs. Mfg. Co., 30 N. W. (Mich.) 109.

It is a question for the jury, under the evidence, whether the minor servant who was injured was o such age, intelligence, discretion and judgment that he should have understood the dangers of the employment and assumed the risks thereof.

Luebke vs. Berlin Machine Works, 60 N. W. (Wis.) 711.

It is the duty of a master not only to furnish safe machinery, but to exercise watchfulness to keep it in repair.

Shebeck vs. Mational Cracker Co., 94 N. W. (Iowa) 930.

On the issue of assumption of risk, the age and experience of the servant are to be considered in determining whether he knew or ought to have known and appreciated the peril.

Shebek vs. National Cracker Co., *Id.*

The servant has a right to assume superior knowledge in his employer, to rely on his prudence and judgment and to believe that he will not unnecessarily jeopardize his person and life by a voidable risk.

Mihan vs. La. Electric Light Co., 7 L. R. A. (La.) 172.

Wood on Master and Servant, 681.

2 Thompson on Negligence, 975.

The paragraph last above quoted is an expression of the law borne out by all of the authorities. It is particularly applicable to this case. An ignorant, inexperienced servant—and in our complaint we say he was like unto a boy fourteen years of age, he had a right to assume, and did assume, this superior knowledge of his employer and felt safe in the confidence so reposed.

The Motion for Nonsuit.

The third error assigned is the denial by the court of the motion of defendant for a nonsuit. This error cannot be considered on this record for the reason that the defendant, after the motion was denied, introduced testimony in its own behalf.

The Supreme Court of Idaho has held that such action is a waiver of the motion by the defendant.

Territory vs. Neilson, 2 Ida. 614; 23 P. 537.

Shields vs. Johnson, 12 Ida. 329; 85 P. 972.

In the latter case the statute is cited and shown to be identical with that of Montana, which was construed by the Supreme Court of Montana, and thereafter by the Supreme Court of the United States in Boyk vs. Gassert, 149 U. S. 17, in which Mr. Justice Brown delivered the opinion of the Court, and at page 23 he says:

"A defendant has an undoubted right to stand upon his motion for a nonsuit, and have his writ of error,

if it be refused; but he has no right to insist upon his exception after having subsequently put in his testimony and made his case upon the merits, since the court and jury have the right to consider the whole case as made by the testimony. It not infrequently happens that the defendant himself, by his own evidence, supplies the missing link, and if not, he may move to take the case from the jury upon the conclusion of the testimony."

See also:

Grand Trunk Ry. Co. vs. Cummins, 106 U. S. 700.

Accident Ins. Co. vs. Crandall, 120 U. S. 527.

Columbia & Puget Sound Ry. vs. Hawthorne, 144 U. S. 202.

Practically the same question, however, is raised by plaintiff in error in the argument relative to its motion for a directed verdict.

The Motion for a Directed Verdict.

This constitutes the fourth assignment by plaintiff in error. Let us endeavor to show that the testimony supports the allegations of the complaint and justifies the verdict.

1. The testimony shows that the plaintiff was inexperienced. His own testimony is in part substantially as follows:

He was born in Ireland; 28 years old at the time of the trial; had been in this country three years at the

time of the accident. In the old country had worked on a farm aud in America had shoveled coal and worked on a hoist for a few days. He then began work in defendant's mill, working first on the log deck, outside the mill. When he was employed by the defendant he told their foreman, Mr. Salscheider, that he had never worked in a sawmill. Again, when he was put to work tailing the edger he told the same foreman that he "didn't know nothing about it." (Transcript, pages 74 to 77.) He is rather illiterate, being barely able to read and write. He testifies that at the time he was injured he did not know he was working in a dangerous place.. (Transcript, page 90.)

2. The defendant did not warn him of any danger.

On page 78 of the Transcript the plaintiff testifies that neither Mr. Salscheider nor any other agent or officer of the company told him anything about any danger connected with that work. It is true that Salscheider in a way denies this and says: "I told him that the only danger was that the boards would catch him and shove him out of the hole." Even that, if true, was not a sufficient warning and the jury under proper instructions preferred to believe the plaintiff, as they had a right to do.

3. Plaintiff was required to do more work than should be required of one man.

In this regard the plaintiff testifies that before he began work there he had seen two men working on this job tailing the edger. (Transcript, page 78.)

Again, on page 92 of the Transcript, he testifies that when he first went to work he had a man helping him for two days and after that he had no assistance. Eric Ostblom, a witness for the defendant, testifies that he helped Goodwin for about four days and then went back to his other work on the slasher. (Transcript, page 235.)

Salscheider, the defendant's witness and manager, testifies that this boy Ostblom helped the plaintiff all the time that plaintiff was there, but also testifies that they had never had one man on the job before or since. (Transcript, page 250 and 251.)

Mr. Strathern, who was subpoenaed as a witness for the defendant, and then went to their mill to examine and make measurements and qualify himself as a witness, found two men working on this job. (Transcript, page 221, also page 225.)

This testimony of the defendant can not be reconciled with defendant's theory of the case. It either shows that they recognized the plaintiff's inexperience or that they knew the work was too great for one man.

4. Was it a safe place to work?

Mr. Bellis, a witness for the plaintiff, testifies that it was not a safe place to work and that the pit was

not properly constructed. (Transcript, pages 146 to 149.)

He also testifies in rebuttal that the Sunday following this accident the pit was changed so as to make it less dangerous. (Transcript, page 295.) This of course was denied by Mr. Smith, constituting another conflict of evidence for the jury to pass upon. (Transcript, page 277.)

Mr. Strathern at first said the pit was safe (Transcript, page 221) but on cross-examination said that a board coming through there under certain conditions might push against the leg of a man and pin it up against the side of the pit. (Transcript, page 227.) He further testified as follows:

"Q. And a green hand in there is liable to get caught, isn't he?

"A. I don't think a man would put a man in there unless he notified him; I know I never do.

"Q. In other words, there is sufficient danger about that place to justify a man in putting a man in a place of that kind, to notify him of the danger?

"Yes, sir.

"Q. And you, as a prudent millman, would give him such warning, wouldn't you?

"A. Yes, sir.

"Q. You have told about this incline on the back end of the pit. Suppose there wasn't any incline there, but that it was straight up and down, and a

man's leg was caught, it might crush it pretty hard, might it not?

"A. That would be against the roll.

"Q. And if the incline was there it would have a tendency to push him out on the table?

"A. If the board was down below the center of the roll, it would."

Salscheider testified that he had seen a man working in this pit caught and pushed up the incline. (Transcript. page 258.) On cross-examination he said that the man who took Goodwin's place got pushed out of there by looking around toward the back end of the mill. Transcript, page 261.)

It will be remembered that this incline, according to the testimony of Mr. Bellis, was not in existence until after Mr. Goodwin was injured, and they then constructed the pit so that a man getting caught would be pushed out of the pit and not pinned against the outer wall of it, as Goodwin was.

John T. Smith, defendants witness and employe, testified that there was no danger of a man being caught and pushed out behind from that table but he further testified on the same subject: "It requires a certain amount of skill there for a man must get accustomed to the kind of work that he is doing; it is a pretty busy place when small stuff is coming through the edger". (Transcript, page 281)

It seems to us that the repair of the pit is a significant feature in this case.

The plaintiff testifies that there was no incline. On page 91 of the record, he says, "the sides and ends of this pit were straight up and down." Bellis testifies to the same fact and that he saw the workmen putting in the incline.

Smith fixes the date of making the changes as the spring of 1908 but insists that the incline was there before and that he was simply repairing it. (Transcript, page 267).

It seems to be conceded that if the pit actually existed without an incline that it was a dangerous place to work and there is the testimony of the plaintiff and Bellis that such was the conditions and the testimony of defendants's witnesses to the contrary. This conflict of testimony appears to have been decided by the jury in favor of the plaintiff and it was their province to do so.

The only remaining question to be considered in the determination of this motion is, Was the plaintiff injured at all? If he was then he was entitled to recover something, and on this question the opinion of the trial court, as found on page 203 and 204 of the transcript, is conclusive and we therefore submit no further argument.

As to the amount of the verdict, that may be considered under the fifth and sixth assignments of error.

Counsel for plaintiff in error in his brief has argued the fifth and sixth asssignments of error together. In the sixth assignment of error reference is made to an instruction given by the court, although the bill of exceptions does not contain any referance to the giving of such instruction and that portion of the assignment cannot as we understand this rule, be considered by this court.

In Rose's Code of Federal Procedure, Volume 2, page 1531, the rule is laid down that a statement in the assignment of errors of the grounds of an objection to the admission of evidence is not sufficient where such grounds were not stated in the bill of exceptions, and in general assignments of error based upon evidence which, although printed in the record, is not contained in the bill of exceptions or otherwise authenticated, will not be considered. The Circuit Court of Appeals for the Seventh Circuit in discussing a record which was in like condition, says: "In the assignment of errors following a question to the plaintiff touching her capacity as an artist to earn money, is a statement that the question was objected to because incompetent, immaterial, speculative, remote and purely problematical, but such a statement in an assignment of errors is out of place and does not supply a failure to state in the bill of exceptions the grounds of the objection."

North Chicago Street Ry. Co. vs. St. John, 85 Fed. 806; 29 C. C. A. 634.

This Court has held that where the evidence was printed in the record but was not embodied in a bill of exceptions or otherwise authenticated as having been used before the trial Court, assignments of error based on the evidence could not be reviewed.

Lee Won Jeong vs. U. S. 145 Fed. 512; 76 C. C. A. 190.

Following the reasons of these decisions, we submit that the sixth assignment of error, so far as it refers to the purported instruction of the Court, can not be considered for the reason that the purported instruction appears only in the assignments of error and does not appear in the bill of exceptions and is not authenticated. The bill of exceptions simply shows that the court instructed the jury and no exceptions were taken by either party except as to the peremptory instruction requested by the defendant. (Transcript, page 300 to 302.)

Furthermore, the bill of exceptions does not contain the instructions given by the trial court, and it is the rule that assignments of error relating to instructions to the jury can not be considered where the record contains only a portion of the charge of the court.

Johnson vs. Willapa (Ninth Circuit), 173 Fed. 488

The only remaining question in the case is whether the verdict for three thousand dollars was so excessive as to entitle this court to set aside the verdict and reverse the judgment and direct a new trial. Let us examine the record as to the injury.

A few minutes after the accident plaintiff went back to work and worked the rest of that day and the following day, although he says he was hardly able to walk.

Then he reported it to the foreman, receiving a hospital ticket and went to the hospital (Transcript, page 83.) It seems that this hospital was maintained by the defendant. At least he got a hospital ticket in the office of the company from its cashier. He became dissatisfied with the hospital doctor, left the hospital aud obtained private treatment, and although still suffering severe pain, went to work again, sweeping sawdust in the mill of another company, and afterwards did various other jobs from time to time, although he says during all this time his leg was frightful and getting worse right along, and that he could hardly walk on it. (Transcript, page 86.)

He then went to the Harrison Hospital and Dr. Busby first tried to save his leg and finally was compelled to amputate it (Transcript, page 87). Testifying further about his suffering he said "I suffered terribly all the time, never could sleep or rest, always suffering pain and agony." Also that he

had suffered since the amputation, physical health is broken down although he was always healthy, robust and strong prior to this injury. He was a hard working boy, sober and industrious (Transcript pages 89 and 90). He spent four hundred dollars in doctering himself. He also testified that he had never at any time received any other injury in that leg other than the one received in defendant's mill. (Transcript, pages 92 and 93).

The witness John Bennett corroborates the plaintiff as to his injury and suffering. This witness and plaintiff slept together after plaintiff had received the injury. The witness hestified that the plaintiff was lame and doctored his leg nights and bathed it with turpentine and liniment.

The witness George Darrow also knows practically the same thing. He saw the plaintiff rub liniment on his leg at night before going to bed and walked lame. This lameness kept increasing. (Transript, pages 132 and 133).

Dr. John Busby testifies that the plaintiff came to his hospital in Harrison and that on examination he found a tenderness about the right knee joint; that he treated it without success until finally he made an incision above the knee joint and found probably a half tea cup full of pus and three or four days after another incision also without success and finally the leg was amputated. Transcript pages 186—187

On amputation he found the bone was decomposed and the disease of the bone was what is known as osteomyelitus, or acute inflammation of the bone. He also testified that the previous injury of the leg, as testified to by the plaintiff, would predispose to an attack of osteomyelitus. (Transcript, page 189.)

On cross-examination he testified that one of the main causes for the disease was an injury. Again he says that the injury in his opinion would predispose to it, but he would not be willing to say that the injury was the cause of the attack which he had. (Transcript, page 196.)

On redirect examination he says that if the injured part was in a weakened condition the disease would develop much faster. (Transcript, page 196.)

Dr. John Woods, a witness for the defendant, testified that the disease osteomyelitus might develop in a few days or a few years. Also that it would be possible for a person to receive a severe bruise and no laceration of the skin and cause a condition which would develop this disease. (Transcript, page 287.) Thereupon the court asked the witness the following question and the following answer was given:

"Q. You say that this disease might result from a wound or pressure where the skin is not broken?

"A. Yes, sir; in that case the infection would be carried to the point of lower resistance through the blood; the infection would not go in through the skin.

It would simply mean that there would be an area of low resistance causing the infection to be more readily planted there through the blood. In itself if the patient's powers of resistance were good, it wouldn't necessarily imply that there would be any added danger of osteomyelitis, but with any point of low resistance, even without infection, the point may become infected, through the blood stream, or, in other words, through pus germs carried there accidentally through the blood streams. It would be a second type of infection; infection may come either from within or without. The bruise would simply act as a predisposing cause in that case to the osteomyelitis, not as a direct cause." (Transcript, page 288.)

The above is substantially the testimony as to the suffering and the injury and the circumstances of the amputation, together with the opinion evidence of the physicians.

We contend of course that the purported instruction by the trial court set out in his sixth assignment of error cannot be considered by this court for the reasons heretofore assigned but for the moment waiving that question it will be noted that the purported instruction charges the jury that they cannot award damages to the plaintiff *directly* because of the loss of his leg or the amputation of his leg.

The extracts from the testimony hereinbefore given lead to the inevitable conclusion that if the am-

putation was not directly caused by the injury complained of, it was superinduced or indirectly caused by such injury.

On this question we desire to cite the case of Adams vs. Bunker Hill Mining Co., 12 Idaho, page 644; 89 Pacific, page 624, in which the Supreme Court discussing a similar legal proposition says:

"There are very few things in human affairs and especially in litigation involving damages that can be established to such an absolute certainty as to exclude the possibility or even some probability that another cause or reason may have been the true cause or reason for the damage rather than the one alleged by the plaintiff, but such possibility or even probability is not to be allowed to defeat the right of recovery where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause."

From all the evidence, however, it is safe to conclude that this accident causing the plaintiff's leg to be sore during all the time intervening between the accident and the amputation, if not the direct cause of the amputation materially hastened it and if that is true then as a matter of law the pliantiff was entitled to recover for the amputation.

Lousville & Nashville Ry. vs. Northington Tenn. 16 L. R. A., 368.

When two causes co-operate to produce the damage resulting from a legal injury, the proximate cause is the originating and efficient cause which sets the other cause in motion.

Lapleine vs. Morgan's Ry. Co., 1 L. R. A. 378.

Thus, though the damage done to a child by an injury appears to be aggravated by a latent hereditary hysterical diathesis, which had never exhibited itself before the accident, and might have developed but for it, the party in fault will be held for the entire damage as the direct result of the accident.

Lapleine vs Morgan's Ry. Co., Id.

In line with this theory is the case of of Terre Haute Railway Co. vs Buck, 96 Ind. 346; 49 Am. Rep 168, that where one one is injured by the negligence of another and the injury renders the system more susceptible to disease and less able to resist it and death results from such disease the death is legally attributable to such negligence. The same case also holds that it is not neccessary that the injury should be the sole or direct cause of the death, if it concurs in producing death.

In the same case on rehearing, Elliot, Judge, used the following language:

"Counsel assume that the fever of which the plaintiff's intestate died was an independent cause, entire-

ly separate from the injury received by the fall from the trestle-work. The evidence does not warrant this assumption, for it shows that the injury concurred in producing the fever, and also inproducing the enfeebled condition which incapacitated the injured man from resisting the inroads of disease. There was not only a condition created which made it probable the intestate would take on disease, but there was also such an enfeeblement of the system as impaired its power to repel disease.

"Counsel argue the case as though it were neccessary that the evidence should show with direct and positive certainty that the injury produced death. The assumption upon which the argument rests cannot be made good. It is not neccessary in any civil case to prove the substance of the issu e by direct or positive evidence. It is sufficient if there are facts fairly warranting the jury in inferring the conclusion insisted upon by the plaintiff. Indianapolis, etc, R. Co. vs. Colinghead, 71 Ind. 476; Indianapolis, etc., Ry. Co. vs Thomas, 84 id 194; 1 Greenl. Ev., Sec. 13, n. In the case before us the evidence very clearly and fully warranted the inference that the injury concurred in producing death; indeed any other conclusion would be directly opposed to that which the evidence supports.

"It was not necessary that the appellee should show that the injured was the sole or direct cause of the

death. The conclusion stated in our former opinion is fully sustained by a case which has been brought to our attention since that opinion was written. The case to which we refer is that of Beauchamp vs. Saginaw, etc.. Co., 50 Mich. 163; s. c., 45 Am. Rep. 30. In the course of the opinion the court said: "Is it clear beyond dispute, that the cold taken, pneumonia and death were independent and separate from the injury received and sickness resulting there from? Can it be said with judicial certainty that the injury, the sickness and weakness following therefrom did not directly cause or largely contribute to the attack of pneumonia, and that the party wrongfully injured was as able to withstand this resultant attack as he would have been if a good healthy well nourished boy, as at the time he received the injury? If the injury received and sickness following concurred in and contributed to the attack of pneumonia. the defendant must be held responsible therefor. It can not be said that here was a second wrongful act, or a disease wholly independent of the first wrong, which caused the death of the boy. People vs. Cook, 39 Mich. 239.' The case in hand is in every feature infinitely stronger than the one from which we have quoted."

Terra Haute Ry. Co. vs. Buck, 49 Am. Rep. 182.

The fact that a person was suffering from Bright's disease at the time he was injured does not impair

his right of recovery against the party in fault for injury although the injury was aggravated by the disease.

Louisville Ry. Co. vs. Snyder, 117 Ind. 435; 3 L. R. A. 434.

The same rule was applied to the development of catarrh as a result of an injury to the nose to a person who never had catarrh before.

Quackenbush vs. C. W. Ry. Co., 73 Iowa 458.

It is a question for the jury to determine whether cancer which developed on a person at a place where she was injured and shortly after the injury, was a result of the injury.

Baltimore City Ry. C. vs. Kemp, 61 Md. 74.

It is useless to cite further authorities on these elementary principles.

In cases of this character, it is always a question for the jury, under proper instruction, to determine the issue both as to the cause of the injury and the amount of the verdict. Our argument has been on the theory that the jury were properly instructed, and that, under proper instruction, they had found a verdict, the amount of which was perhaps based on a belief by the jury that the amputation of the limb was closely connected with the injury complained of. But, even if it might be held that the evidence did

not justify such a conclusion by the jury, yet the account of the intense suffering which the plaintiff testifies that he was subjected to on account of this injury, and the other evidence in the case, constitute sufficient evidence to justify the verdict. We undertake to say that the appellate court will not set aside a verdict of $3000.00 as excessive in this case in any event.

The seventh error assigned by the plaintiff in error is that the jury ignored and disregarded a purported instruction of the court in regard to the duty of the defendant to provide a reasonably safe place for plaintiff to work.

This assignment cannot be considered for the same reason that the sixth assignment of error cannot be considered, viz: that the purported instruction appears only in the bill of exceptions. In fact, the record does show that there was testimony as to the unsafe place in which plaintiff was required to work, and which we have argued heretofore under the fourth subdivision of the discussion of defendant's motion for a directed verdict.

The whole question was fairly submitted to a jury, under proper instructions which are not before the

Court, and which are presumed to have correctly stated the law.

We, therefore, respectfully submit that the judgment should be affirmed.

R. T. MORGAN,
EDWIN McBEE,

Attorneys for Defendant in Error, residence and post office address Coeur d'Alene, Idaho.

No. 1822

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STEAMSHIP COMPANY (a Corporation), Claimant of the American Steamship "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,
Appellants,

vs.

A. SCHILLING & COMPANY (a Corporation),
Appellee.

APOSTLES.

Upon Appeal from the United States District Court for the Northern District of California.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1822

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STEAMSHIP COMPANY (a Corporation), Claimant of the American Steamship "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,
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A. SCHILLING & COMPANY (a Corporation),
Appellee.

APOSTLES.

Upon Appeal from the United States District Court for the Northern District of California.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Stipulation Under Admiralty Rule 4.]

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY,

Libelant,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,

Respondents,

UNITED STEAMSHIP COMPANY (a Corporation),

Claimant.

It is hereby stipulated by and between the respective parties hereto, under Admiralty Rule 4 of the United States Circuit Court of Appeals for the Ninth Circuit, that the apostles herein may omit therefrom all of the record, testimony, papers and proceedings filed, taken or had herein, except the following which shall be set forth in said apostles:

1. A caption exhibiting the proper style of the court and title of the cause; and a statement showing the time of the commencement of the suit, the names of the parties thereto, including claimant, the respective dates when the pleadings herein were filed, the time when the trial hereof was had, and name of the judge hearing the same, the result of said trial, date of entry of interlocutory decree, ref-

erence of question of damages to the commissioner, result of the proceedings taken before such commissioner and of his report thereon, exceptions thereto, and date of the entry of the final decree, as well as date when the notice of appeal therefrom was filed.

2. The libel herein, amendment thereto, and answer to libel as amended.

3. All of the testimony and other proofs adduced herein before the commissioner.

4. The interlocutory decree, report of commissioner, exceptions thereto, and final decree in the cause.

5. The notice of appeal, citation on appeal, and assignments of error.

It is further stipulated and agreed that the appeal herein is taken pursuant to section 3 of admiralty rule 4 of the Circuit Court of Appeals. If said rule be held unconstitutional, or invalid for any other reason, then this appeal shall be dismissed. If said rule be held or deemed to be constitutional, then the sole question to be reviewed by the Circuit Court of Appeals on said appeal shall relate to the value of the damaged coffee involved herein at the time of its delivery to libelant.

Dated, San Francisco, California, December 22, 1909.

PAGE, McCUTCHEN & KNIGHT,
Attorneys and Proctors for Appellant.
WILLIAM DENMAN,
Attorney and Proctor for Appellee.

[Endorsed]: Filed Dec. 23, 1909. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

In the District Court of the United States of America, in and for the Northern District of California.

No. 13,642.

A. SCHILLING & COMPANY (a Corporation),
Libelant,

vs.

American Steamer "SANTA RITA," Her Tackle, Apparel, and Furniture, and All Persons Intervening for Their Interests Therein,
Respondents.

Statement of the Clerk of the District Court.

PARTIES.

Libelants: A. Schilling & Company, a corporation.

Respondents: American Steamer "Santa Rita," her tackle, apparel and furniture, etc.

Claimants: United Steamship Company, a corporation.

PROCTORS.

Libelants: Mr. WILLIAM DENMAN.

Respondents and Claimants: Messrs. PAGE, McCUTCHEN and KNIGHT.

1907.

March 16. Filed verified libel.
Filed libelant's stipulation for costs.
Issued Monition for attachment of the steamer "Santa Rita," and which said Monition was afterwards on the 17th day of March, 1907, returned and filed with the following return

of the United States Marshal endorsed thereon:

"In obedience to the within Monition, I attached the American Str. 'Santa Rita,' therein described on the 16 day of March, 1907, and have given due notice to all persons claiming the same, that this Court will on the 2d day of April, 1907 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I also served a copy of this Monition on C. E. Erikson, Chief Officer of said American Str. 'Santa Rita,' and placed a keeper in charge.

CHARLES T. ELLIOTT,
United States Marshal.
By James L. Nolan,
Deputy.

San Francisco, Cal., March 18, 1907."

March 21. Filed claim of United Steamship Company.

Filed claimant's stipulation for costs.

Filed admiralty stipulation for release of steamer "Santa Rita," in the sum of $8,000.00, with United States Fidelity and Guaranty Company, as Surety.

April 26. Filed answer of claimant, United Steamship Company.

May 2. Filed amendments to libel.

1908.

Dec. 10. The above-entitled cause came on for hearing this day, in the District Court of the United States of America, in and for the Northern District of California, held in the City and County of San Francisco, before the Honorable John J. De Haven, Judge of said Court, and after the hearings of said cause, was on the 23d day of December, 1908, submitted to the Court for consideration and decision.

1909.

March 3. Filed findings of fact and conclusions of law therefrom, and ordered that libelant recover damages and costs.

Ordered cause referred to United States Commissioner James P. Brown, to ascertain and report amount of damages, but which said

May 27. order was set aside on May 27th, 1909, and cause referred to Commissioner Francis Krull.

June 3. Filed report of United States Commissioner Francis Krull, finding amount of damages sustained by libelant, to be the sum of $4,776.10, within interest at the rate of 6% ($667.06), making a total sum of $5,443.16, due libelant.

June 12. Filed claimant's exceptions to report of commissioner.

Aug. 6. Filed memorandum opinion, ordering exceptions to report of commissioner overruled, ordered said report confirmed.

Aug. 16. Filed Final Decree.

Sept. 28. Filed Notice of Appeal.

In the District Court of the United States, Northern District of California.

IN ADMIRALTY.

A. SCHILLING & COMPANY (a Corporation), Libelant,

vs.

American Steamer "SANTA RITA," Her Tackle, Apparel, and Furniture, and All Persons Intervening for Their Interests Therein, Respondents.

Libel in Rem for Damages to Cargo.

To the Honorable J. J. DE HAVEN, Judge of the United States District Court, Northern District of California, in Admiralty:

The libel of A. Schilling & Company, a corporation, duly organized and existing under and by virtue of the laws of the State of California, and doing business therein, against the American steamer "Santa Rita," whereof Arthur B. Conner was and is master, her tackle, apparel and furniture, and all persons intervening for their interests therein in a

cause of contract, civil and maritime, alleges as follows:

I.

That libelant is informed and believes, and upon such information and belief alleges, that some time in the month of October, A. D. 1906, Arbuckle Bros. shipped on board the said Steamer, then lying at the port of New York, State of New York to be carried and transported in said steamer to the port of San Francisco, State of California, and delivered to the libelant at said port, five hundred (500) bags of Santos coffee, weighing seventy-seven thousand two hundred and four (77,204) pounds, the said coffee then being in good order and well-conditioned, and to be delivered to libelant in like good order; and the said Arthur B. Conner, as said captain, received the said coffee aboard said ship and agreed to carry the same in said manner and as a common carrier thereof to said port of San Francisco; that said steamer "Santa Rita" was owned by the United Steamship Company, a New Jersey corporation, and was chartered for said voyage by the Union Oil Company, a California, corporation; that said Arthur B. Conner was the agent of both said corporations and of said ship in receiving said coffee; that said ship was on said voyage carrying goods as a common carrier by sea.

II.

That the said steamer "Santa Rita" did steam on the said voyage and did thereafter arrive at the port of San Francisco, and did there deliver to the libelant the said coffee, but, as libelant is informed and

believes, and upon such information and belief alleges, not in the like good order as when delivered to the said ship, but, on the contrary, the said coffee when delivered to the libelant at the said port of San Francisco was badly damaged by contact with oil and water, which damage was inflicted upon the said cargo while in the possession of the said ship on the said voyage.

III.

That the injury to the said cargo so received on the said voyage is more than five thousand (5,000) dollars, and that libelant has been damaged in said amount.

IV.

That the said steamer "Santa Rita" is now within the port of San Francisco, Northern District of California.

V.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Court.

Wherefore, the libelant prays that process in due form of law according to the course of this Court in causes of admiralty and maritime jurisdiction may issue against the said steamer, her tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of the damages aforesaid with costs, and that the said vessel may be condemned and sold to pay the same, and that the libelant may have such other

and further relief in the premises as in law and justice they may be entitled to.

WILLIAM DENMAN,
Proctor for Libelant.

State of California,
City and County of San Francisco,—ss.

R. Schilling, being first duly sworn, deposes and says:

That he is the Secretary of the corporation libelant herein; that he is duly authorized by the said corporation and instructed by it to verify this libel; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to such matters he believes it to be true.

R. SCHILLING.

Subscribed and sworn to before me this 16th day of March, 1907.

[Seal] JOHN FOUGA,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Mch. 16, 1907. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

In the District Court of the United States, Northern District of California.

IN ADMIRALTY.

A. SCHILLING & COMPANY (a Corporation),
Libelant,

vs.

American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interest Therein,
Respondents.

Amendment to the Libel.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States, for the Northern District of California:

Now comes the libelant herein, and finding new facts set up in the answer of the United Steamship Company, claimant of the above-named steamer "Santa Rita," pursuant to Rule 51 of the Admiralty Rules of the Supreme Court of the United States, it files its amendment to the libel by it herein filed, adding thereunto and alleging as follows:

I.

That it is true that the coffee injured while carried by the said steamer "Santa Rita" as heretofore described in this libel was carried under bill of lading issued by and on account of said steamship, and that the copy of the bill of lading set forth in the answer of claimant is a full, true and correct copy of said bill of lading; that long prior to the delivery

of the said cargo in San Francisco, and prior to the receipt of the said injury by said cargo, Arbuckle Brothers, the person to whom the said bill of lading was issued and the consignee therein named, assigned, endorsed and set over the said bill of lading to libelant, and that libelant has ever since been and now is the owner and holder of the said bill of lading, and at the time of the receipt of the injuries by the said coffee was and now is the owner of the said coffee.

WILLIAM DENMAN,
Proctor for Libellants.

State of California,
City and County of San Francisco,—ss.

Rudolph Schilling, being first duly sworn, deposes and says:

That he is the secretary of the corporation libelant herein; that he is duly authorized by the said corporation and instructed by it to verify this libel; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to such matters he believes it to be true.

RUDOLPH SCHILLING.

Subscribed and sworn to before me this first day of May, 1907.

[Seal] JOHN H. WARE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 2, 1907. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

In the District Court of the United States, Northern District of California.

IN ADMIRALTY.

A. SCHILLING & COMPANY (a Corporation),
Libellant,

vs.

American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interest Therein,
Respondents.

Answer.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States, for the Northern District of California:

The answer of United Steamship Company, claimant of the above-named steamer "Santa Rita," intervening for its interests in said vessel, to the libel herein of A. Schilling & Company, a corporation, alleges, as follows:

I.

That it is true that in the month of October, 1906, Arbuckle Brothers shipped on board said steamer, then lying at the port of New York, State of New York, to be carried and transported in said steamer to the port of San Francisco, State of California, to the order of said Arbuckle Brothers, and not otherwise, and delivered to libellant at the port last named, five hundred bags of green coffee, and not otherwise, weighing six thousand five hundred pounds, and no more, but claimant is entirely ignorant as to the

order and condition of said coffee, and each and every part thereof, at the time of said shipment, and therefore leaves libellant to its proof thereof.

II.

Claimant denies that said coffee, under the terms of the contract of shipment, was to be delivered to libellant in good order and well-conditioned; and denies that the master of said ship, to wit, Arthur B. Conner, agreed to carry said coffee in the manner set forth in said libel, or in any manner or under any other terms or conditions than those set forth in the bill of lading, under which said coffee was transported as aforesaid, which bill of lading is here referred to and a copy thereof is hereunto attached and made a part hereof; and claimant avers that the said Arthur B. Conner received said merchandise on board of said steamer as master thereof, and as agent for either claimant or the Union Oil Company, a California corporation, as the interest of each may appear under a charter-party theretofore entered into between them, and then in effect, and not otherwise.

III.

Claimant alleges that the coffee referred to in said libel, after being received on board of said steamer, was carried thereby from the said port of New York to the said port of San Francisco, under the contract of carriage hereinbefore set forth, and not otherwise, and that claimant is the sole owner of said vessel.

IV.

Claimant alleges that upon the arrival of said

steamer at said port of San Francisco, said coffee was delivered to libellant, but claimant has no information or belief upon the subject sufficient to enable it to answer the allegation of the libel respecting the condition of said coffee at the time of its delivery as aforesaid, and therefore placing its denial on that ground it denies that at such time said coffee was badly or at all damaged by contact with oil and water, or either thereof.

On the other hand, claimant avers the fact to be that said coffee, if damaged at all, was damaged by a cause specified in said bill, of lading as exempting said carrier from liability, to wit, from leakage, breakage, contact with other goods, and perils of the sea.

V.

Claimant has no information or belief upon the subject next hereinafter mentioned sufficient to enable it to answer the allegations of the libel in said behalf, and therefore placing its denial upon that ground it denies that the injury to the cargo hereinbefore referred to on said voyage is more than five thousand (5,000) dollars, or is said sum or any part thereof, and denies that the libellant has been damaged in said amount or any part thereof.

Wherefore, claimant prays that the libel may be dismissed, with its costs in this behalf sustained.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant.

State of California,
City and County of San Francisco,—ss.

James Jerome, being duly sworn, deposes and says: That he is an officer, to wit, the treasurer of the United Steamship Company, the claimant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

JAMES JEROME.

Subscribed and sworn to before me this 26th day of April, 1907.

[Seal] ROBT. J. TYSON,
Notary Public in and for the City and County of San Francisco, State of California.

[Exhibit to the Answer—Bill of Lading.]

Shipped, in good order and condition by Arbuckle Bros. in and upon the Steamship called Santa Rita whereof is master for this present voyage A. B. Conner or whoever else may go as Master in the said Vessel, and now lying in the port of New York, and bound for San Francisco, Cal., Five Hundred (500) bags Green Coffee S. covers being marked and numbered as in the margin; and are to be delivered from the ship's deck, where the ship's responsibility shall cease, in like good order and condition, at the aforesaid port of San Francisco (the act of God, the Kings Enemies, Pirates, Robbers, Thieves, Ver-

min; Barratry of Masters or Mariners, Restraints of Princes and Rulers, Loss or damage arising from insufficiency in stength of Packages, from Sweating, Leakage, Breakage, or from stowage or contact with other goods, or from any of the following perils, whether arising from negligence, default, or error in judgment of the Master, Mariners, Engineers or others of the crew, or otherwise howsoever excepted), namely; Risk of Craft, Explosion or Fire at sea, in Craft or on Shore, Boilers, Steam or Machinery, or from the consequence of any damage or injury thereto howsoever such damage or injury may be caused, Collision, Stranding, or other perils of the seas, Rivers, or Navigation, of whatever nature or kind soever; and howsoever such collision, Stranding or other peril may be caused, with liberty, in the event of the steamer coming back to New York, or into any other port, or otherwise being prevented, from any cause, from proceeding in the ordinary course, of her voyage; to tranship the Goods by any other Steamer, and with liberty during the voyage to call at any port or ports, to receive Fuel, to load or discharge Cargo, or for any other purpose whatever, to sail with or without pilots, and to tow and assist vessels in all situations, unto San Francisco, Cal., or to owners or their Assigns, Freight for the said goods being paid, immediately on landing, without any allowance of credit or discount, at the rate of forty (40c) cents per hundred gross weight delivered with 5 per cent. primage and average accustomed. In Witness whereof, the Master or Agents of the said Ship hath

affirmed to one Bill of Lading, besides Captain's copy, all of this tenor and date, one of which Bills being accomplished, the others to stand void.

Weights, Measures, Contents, Quality, Brand and Value unknown. The Goods to be taken from alongside by the Consignee, immediately the Vessel is ready to discharge, or otherwise they may be landed and warehoused at his risk and expense. The Collector of the Port is hereby authorized to grant a general order for discharge, immediately after the entry of the Ship. The master Porterage of the delivery of the cargo to be done by the Consignee of the ship, and the expense thereof to be paid by the receivers of cargo. The owner of the Ship will not be responsible for Money, Documents, Gold, Silver, Bullion, Specie, Jewelry, Precious Stones or Metals, Paintings and Statuary, unless Bills of Lading are signed therefore and the value thereof therein expressed.

In accepting this Bill of Lading, the Shipper or other Agent of the Owner of the Property carried, expressly accepts and agrees to all its stipulations exceptions and conditions, whether written or printed, Sterling freight, at the quoted short exchange on London, and Dollar freight Fres. 5f. 25c. in Gold, to the Dollar.

Dated in New York, Oct. 20, 1906.

FILLMORE CONDIT, Agent.

Not Accountable for Weights, Marks, Decay, Breakage, or Damage by Rats.

ATTENTION OF SHIPPERS IS CALLED TO THE ACT OF CONGRESS of 1851.

"Any person or persons shipping Oil or Vitriol, Unslacked Lime, Inflammable Matches, or Gunpowder in a Ship or vessel taking cargo for divers persons on freight without delivering at the time of shipment a note in writing expressing the nature and character of such merchandise to the Master, Mate or Officer or other person in charge of loading of the Ship or Vessel, shall forfeit to the United States One Thousand Dollars.

To the Order of Arbuckle Bros.

Notify—A. Schilling & Co., San Francisco, Cal. Mark A. S. & Co., San Francisco, Cal.

Freight 65000 at 40c £.....	$260.00
Primage	1.65
Total £.....	261.65

Pd.

It is also Mutually agreed that this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act relating to the Navigation of Vessels, etc."

Admission of service of the within Answer and receipt of a copy is hereby admitted this 26th day of April, 1907.

WILLIAM DENMAN,
Proctor for Libelant.

[Endorsed]: Filed Apr. 26, 1907. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

[Findings of Fact and Conclusion of Law, etc.]

In the District Court of the United States, Northern District of California.

No. 13,642.

A. SCHILLING & COMPANY (a Corporation),
Libelant,

vs.

American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture,
Respondent.

Upon consideration of the evidence, I find all of the allegations of the libel, and the amendment thereto, to be true;

Second, that the damage to the cargo of coffee mentioned in the libel was not caused by leakage, breakage, contact with other goods, or perils of the sea, or any other cause specified in the bill of lading, as exempting the steamer "Santa Rita" from liability.

As a conclusion of law, from the foregoing facts, I find that the libelants are entitled to a decree for the damages sustained by them on account of the matters alleged in their libel, and for costs.

The case will be referred to United States Commissioner Brown, to ascertain and report the amount of such damages.

Let such a decree be entered.

Dated March 3d, 1909.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Mar. 3, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Order Concerning Decree, Referring Case to United States Commissioner, etc.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 3d day of March, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,642.

A. SCHILLING & COMPANY,

vs.

American S. S. "SANTA RITA," etc.

This case having been heretofore submitted to the Court for decision, now after due consideration had thereon, the Court files its written findings of fact and conclusion of law therefrom, and by the Court ordered that libelant is entitled to a decree for the damages sustained by it on account of the matters alleged in the libel, and for costs.

Further ordered that this case be, and the same is hereby referred to United States Commissioner Brown, to ascertain and report the amount of such damages.

[Order Substituting United States Commissioner.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Thursday the 27th day of May in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,642.

A. SCHILLING & CO.

vs.

Str. "SANTA RITA," etc.,

No. 13,802.

UNION CARBIDE CO.

vs.

SAME.

On motion of Wm. Denman, proctor for libelants herein, by the Court ordered that the order heretofore made herein referring these cases to United States Commissioner Brown, to ascertain and report the amount of damage, be, and the same are hereby set aside and vacated, and further ordered that said cases be, and they are hereby referred to U. S. Commissioner Krull, to ascertain and report thereon on the testimony already taken before him in the case of Thomas H. Haskins et al. vs. Str. "Santa Rita" etc., No. 13,639.

In the District Court of the United States, Northern District of California.

A. SCHILLING & COMPANY,

Libelant,

vs.

The Steamer "SANTA RITA," etc.,

Respondent.

Report of United States Commissioner Francis Krull.

To the District Court of the United States for the Northern District of California:

Pursuant to the order of reference made in the above-entitled case, referring the same to the undersigned as United States Commissioner, to ascertain and report the amount of the damage to which libelant is entitled, I have to report as follows: I was attended on the dates upon which testimony was taken by William Denman, Esq., proctor for libelant, and Samuel Knight, Esq., of the firm of Messrs. Page, McCutchen & Knight, proctors for respondent, and the proceedings and testimony had and taken are hereunto annexed and made a part hereof.

The consignment of coffee upon which damage is to be assessed herein for which the steamer "Santa Rita" has been found to be liable, was a part of the same general cargo, and was injured from the same cause, as the coffee in the case entitled Thomas H. Haskins et al., etc., vs. The Steamer "Santa Rita" etc., No. 13,639, in this court, in which a report has this day been made, and was sold to the same coffee

jobber for the same price, and the findings of facts as to the market value of damaged coffee in said report, is made a part hereof, and adopted as a basis in ascertaining the value of this damaged coffee.

I further find from the evidence herein, the number of pounds of this coffee shipped in good order, as per libelant's exhibit numbered 1, to be 77,204 lbs.

That there were delivered to libelant or on its account, the same weight as shipped.

That the market value of this coffee in sound condition of the date of the arrival of the steamer "Santa Rita" in San Francisco, was eleven and one-half cents per pound, as per stipulation annexed hereto.

From which I find the market value of this coffee in sound condition to be (77,204 lbs. at 11½ cents per lb.) $8,878.46

And from the finding as to the value of the damaged coffee in the report above referred to, I find the value of this coffee in its damaged condition to be (77,204 lbs. at 5¼ cents per lb.) 4,053.21

$4,825.25

I find that there was unpaid freight amounting to 49.15

$4,776.10

From the foregoing findings of fact and conclusions therefrom, I find, and do so report, the amount of the damage to which libelant is entitled to be $4,776.10.

And assuming that interest will be allowed on this sum as in the case of Haskins et al. etc. vs. The Str. "Santa Rita" No. 13,639, I find the amount of the interest to be $667.06, which is six per cent on $4,776.10, from January 30, 1907, to and including the date of this report.

To recapitulate: The damage to which libelant is entitled is ascertained and reported to be..... .....$4,776.10

The interest on this sum at 6% is found to be 667.06

Total $5,443.16

All of which is respectfully submitted.

Dated, San Francisco, Cal., May 28, 1909.

FRANCIS KRULL, [Seal]

United States Commissioner, Northern District of California.

Testimony Taken Before United States Commissioner.

[Testimony of George W. Werlin, for the Libelant.]

Tuesday, April 6th, 1909.

GEORGE W. WERLIN, called for the libelant, sworn.

Mr. DENMAN.—Q. Mr. Werlin, what is your occupation?

Mr. KNIGHT.—I understand, Mr. Commissioner, that Mr. Denman offers this testimony not only in the Schilling case but in the Leege & Haskins case as well. Of course, we shall object to any consid-

(Testimony of George W. Werlin.)

eration of the evidence in the Leege & Haskins case on the ground that that hearing has been closed and the matter submitted to the Commissioner for decision.

Mr. DENMAN.—That being the case, I make a motion, Mr. Commissioner, to reopen it upon the ground of evidence that I have discovered since the last hearing. In going into the Schilling case I discovered certain matters affecting the Leege & Haskins case, which will throw some light on that proceeding, and as the Commissioner has not reached a decision on that, and as he will be obliged to consider the two cases at the same time, I move that the evidence taken to-day be considered also in the Leege & Haskins case.

The COMMISSIONER.—Of course, I am inclined to grant the motion because I have not taken up this matter at all as yet, and all the evidence that bears upon the subject certainly ought to be in and considered.

Mr. KNIGHT.—It will also be understood that we will be given an opportunity to put in anything we might have.

The COMMISSIONER.—Yes.

Mr. DENMAN.—Q. What is your occupation?

A. Coffee broker.

Q. How long have you been a coffee broker, Mr. Werlin? A. Since July, 1901.

Q. What are your duties as a coffee broker?

A. To bring buyer and seller together on coffee transactions.

(Testimony of George W. Werlin.)

Q. In the course of your profession is it necessary for you to determine the value of coffee?

A. Always.

Q. Does every transaction that you have spoken of require that you determine the values?

A. On all what we call first-hand coffee I am obliged to place values; the coffees that we sell for jobbers they value themselves.

Q. Do you recall the arrival of the steamship "Santa Rita" in San Francisco in 1907?

A. Very well.

Q. In the month of January? A. Yes.

Q. Do you remember the discussion in the market here concerning the "Santa Rita" coffee?

A. Very well.

Q. Did you ever have any discussion with Leon Lewin regarding those coffees? A. I did.

Q. Describe the circumstances under which that occurred?

Mr. KNIGHT.—We object to any evidence tending to show that this witness may have had in the way of discussion with Mr. Lewin regarding this coffee.

Mr. DENMAN.—Q. Answer the question.

A. Mr. Lewin seemed to be very much pleased with the purchase of a certain lot of coffee that he made from the steamer "Santa Rita," and invited me to look at the coffee, and in doing so I immediately recognized that the coffee was not sound; he then told me what he had paid for it, and I immediately told him he was stung. He wanted to know

(Testimony of George W. Werlin.)

my reasons, wanted me to explain, which I did, and he then immediately went to the telephone and asked to have the order or the bid withdrawn, which was refused. This all happened while I was still in the office.

Q. Did you examine any of these coffees?

A. I examined the samples very carefully.

Q. Did you notice anything peculiar about that?

A. Oh, yes, immediately.

Q. What was it?

A. The coffee was damaged by what I call creosote.

Q. Was that odor perceptible?

A. Very strong.

Q. Would you recollect it if you were to encounter it again? A. Yes. sir.

Q. Let me to ask you to examine this sample.

Mr. KNIGHT.—You will note, Mr. Reporter, that the sample has been kept tightly corked, and was uncorked and immediately corked up again.

A. (After examination.) That is the same odor.

Mr. DENMAN.—Q. Now, let me ask you if you will taste a bean of this coffee from Libelant's Exhibit No. 1. (Handing.)

A. (After examination.) I find the same odor in this—the same taste as the odor shows in the other. The odor and the taste is the same thing anyway.

Q. What was the price that Mr. Lewin said that he paid for that coffee?

A. Five and one-fourth cents.

(Testimony of George W. Werlin.)

Q. Do you consider that a fair value for coffee that is imported such as this?

A. No, I consider it an excessive price, and I so expressed myself at the time.

Q. How many samples did you have before you at that time?

A. Quite a number. My recollection is that the pans would cover a space longer than the space of this table.

Q. And how wide?

A. Well, just one row of pans, as I recollect.

Q. Let me ask you; suppose coffee that is worth 11½ cents and coffee that is worth 10½ cents is injured as this coffee is injured here, would the sound value of the coffee in any appreciable way affect the value of the coffee as it was injured?

A. In this condition?

Q. Yes.

A. Not in my opinion. I would not value this coffee according to the sound value. To explain myself, I might say that in a case of an insurance company. I would give a sound value for their guidance. They asked for it, I don't know what for. But in my opinion and in my way of valuing coffee of that kind, I would value it only as I find it; that is, its present condition.

Q. My question is this: Would the sound value of coffee have anything to do with coffee damaged as that is, when it is damaged as badly as that would it make any difference whether its original value was 10½ or 11½ cents? A. Not a bit.

(Testimony of George W. Werlin.)

Cross-examination.

Mr. KNIGHT.—Q. Mr. Werlin, you have been here in town right along, have you not, for the last few months? A. Yes, sir.

Q. And accessible at all times, have you not?

A. Yes, sir.

Q. Anyone who wished to get your evidence or find you for any other business could have seen you at any time; you have been here right along, have you not? A. Yes. sir.

Q. So that you have always been accessible?

A. Yes, sir.

Q. Now, where did you get these samples from, Mr. Werlin, that you say you had before you?

A. They were the samples on or from which Mr. Lewin bought this coffee.

Q. Where did you get them? Did you have them? A. I did not have them.

Q. Who had them?

A. Mr. Lewin had them.

Q. So Lewin told you they were samples of that coffee? A. Of the "Santa Rita."

Q. Isn't that the fact? A. Yes, sir.

Q. The only thing you know as to their being samples was what Mr. Lewin said to you?

A. And that I heard sufficiently about those things so that I could practically recognize them as being the "Santa Rita" coffee without having him to tell me so, and I think I did; I think I told him those were the "Santa Rita" coffees before he told me.

(Testimony of George W. Werlin.)

Q. Were you ever on the dock at all or see the "Santa Rita" coming in with those coffees?

A. No, sir.

Q. Did you ever yourself take any samples of that or were any samples taken in your presence from the "Santa Rita"? A. No, sir.

Q. But you think you could detect from the odor of the coffee and the taste of the coffee, or rather you identify the coffee from the odor and the taste from what you had heard happened to the coffee on board? A. And the kind of coffee.

Q. What is the kind of coffee? A. Santos.

Q. Do you know how much of the Santos coffee Mr. Lewin purchased? I do not want it in bags or sacks, but do you know whether the Santos coffee formed any considerable part of it?

A. I only could guess at it, I would not say exactly.

Q. You would not know?

A. No, sir. I could guess at it and tell you what I think if you care to know that.

Q. Have you any reasonable means of information as to the extent, as to how much of that coffee was Santos and how much was other coffee?

A. I think between 1500 and 1600 bags of Santos. That is all I can say.

Q. Any other coffee to your knowledge?

A. No, not to my knowledge. There probably were some, but I don't remember.

Q. Would it have any difference in your opinion

(Testimony of George W. Werlin.)

whether or not that coffee was Santos or whether it was a Mexican coffee?

A. The same material would damage it, you mean?

Q. As to its value, damaged, in that condition?

A. When it gets to be coffee in that condition, it is just what you can make out of that; it does not make any difference much whether it is Mexican or Santos.

Q. It does not make any difference what kind it is, whether it is Santos or Bogota or Mexican?

A. No, it does not.

Q. Did you roast and test it?

A. I do not remember. It would not be necessary.

Q. So your entire experience with that coffee would be derived from having tasted a bean?

A. In its present state?

Q. Yes. A. No, sir.

Q. How much did you sample?

A. I have had very much experience with coffee damaged by creosote.

Q. Now, would you subject that coffee to a test in order to determine whether that coffee would be palatable, would be drinkable?

A. I know that coffee immediately, I know it as quick as I smell it, that it cannot be made palatable. I say I have had experience with damage by creosote; that is, when I say creosote, I mean that flavor or smell might have been brought about through many things, through smoke or fumes or gas or a thou-

(Testimony of George W. Werlin.)

sand and one things, but experience of that kind I have had perhaps ever since 1890. This was not the first one.

Q. So that you assume that because this coffee had the odor of creosote and the taste of creosote that it was damaged similarly to other coffee with which you had experience?

A. Which had the same taste and smell.

Q. Now, that coffee is commercially used, it is not, here in this port?

A. Well, I think you would find it very difficult to find anyone in San Francisco who would undertake to handle it; that is, as a roaster. I could not say positively that they would not, but I doubt very much whether any of them would.

Q. Is that coffee in as bad condition for commercial use as fermented coffee?

A. Fermented coffee is preferable.

Q. It is preferable? A. Yes, sir.

Q. So that you consider that if that coffee had been fermented it would be of more value than in the condition in which you say it is?

A. Yes, sir.

Q. Is fermented coffee put on the market here for sale or mixed in with other lots so as to be sold?

A. For consumption here?

Q. For consumption.

A. Not that I know of, for consumption here.

Q. Where would it be used for consumption?

A. It might be for other places out of the state.

(Testimony of George W. Werlin.)

Q. How do you mean, other places out of the United States?

A. Well, perhaps that is where it ultimately goes to.

Q. So you don't know of your own experience of any coffee, fermented coffee, that was put in use here in San Francisco mixed with other coffee?

A. Not to be used here.

Q. Not to be used here; simply sold to be taken away from here; is that the idea?

A. Yes, sir.

Q. How about this coffee; have you ever known of coffee similarly damaged, that is, damaged by creosote, to have been used here in this port by itself or mixed with other coffees?

A. Well, I think I could say so from hearsay, that it was once tried by Mr. Schwerin. I don't think he succeeded very well, but that is only hearsay.

Q. We would rather have your own experience?

A. No, I have not.

Q. Mr. Werlin, as a matter of fact, isn't all the coffee damaged similarly to the way in which this coffee is damaged, used right straight along in this port?

A. Not to my own knowledge. I never knew of it. I have used that kind of coffee on this coast myself as a manufacturer, but not in California.

Q. What have you used it for?

A. So I have had experience.

(Testimony of George W. Werlin.)

Q. What have you used it with, in connection with other coffees or by itself?

A. I have mixed it in to my sorrow.

Q. So that your testimony is, that as far as you know, coffee which reaches this port in a similar damaged condition to this is not used, mixed with other coffee and sold to the general public?

A. Here?

Q. Yes.

A. Not to my knowledge. I do not happen to think of a roaster in San Francisco that would do it, unless it would be some new man that had not had any experience.

Q. And you wish to be understood as saying that this coffee is worse than fermented coffee?

A. There might possibly be fermented coffees that are just as bad, but I know of some that were sold cheaper.

A. Yes, some slightly cheaper. As a general thing I would sooner have them.

Q. Did you note, Mr. Werlin, any difference in the taste of these two samples that have been shown you?

Mr. DENMAN.—He has only tasted one.

Mr. KNIGHT.—Q. In the smell of the two samples that were shown you?

A. I would prefer to go into a fuller examination than I made of the two samples.

Q. You were shown on your direct examination two samples, one in a bottle that appears to have been kept tightly corked or covered, and another in

(Testimony of George W. Werlin.)

a paper bag, which has enabled its contents to be exposed to the air. Do you notice any difference in the odor of the coffee in those two samples?

A. The odor of this one was creosote, and the taste of this one was the same as the odor was in that.

Q. How about the difference in the odor, any difference in odor?

A. If you wish me to smell this I can do it.

Q. Do so. I want to know whether you notice any difference in these two samples?

A. One has been open and the other sealed.

Q. That is what I am trying to get at.

A. You are welcome to the information.

Q. What difference do you notice in them?

A. It is quite natural that there should be a difference.

Q. What is the difference?

A. The first sample has been exposed to the air and it has blown off some; that other sample has been sealed, but the taste is there, and you can leave it open and you can spread it out, and you can lay it out and you can turn it out and in fact do anything, and you can never get rid of that creosote.

Q. Now, to what extent is the odor of the creosote in the coffee affected by the question of whether it is left exposed to the air?

A. Whether it is or not?

Q. Whether it is or is not exposed to the air; to what extent does the exposure of the coffee to the air affect the odor or smell?

(Testimony of George W. Werlin.)

A. It seems that some of that which adheres to the outside of the bean blows off, but the essential oil in the bean is simply tainted with the creosote and you can't get rid of it.

Q. Can't you get rid of any of it? In other words, can you make that a more palatable coffee by exposing it to the air rather than by leaving it in a tightly closed jar? A. No, sir.

Q. So that the one remains as bad as the other?

A. Yes. It would be yes or no in both cases, but the no of it is that no matter what you try to do with it, and the effect of the blending that you refer to would simply be a nuisance and a thing you could not overcome; you could not get away from it.

Q. Have you ever known of coffee similarly damaged selling at this port for higher than 5¼ cents a pound? A. I have no recollection of that.

Q. That is the highest figure you have ever heard coffee of that kind to bring in this port, 5¼ cents?

A. Yes, sir.

Q. I mean at or about in the latter part of 1906.

A. Yes. There did not happen to be any other at that time. The only lot that I remember was a lot that came here about 1899.

Q. I don't want to go back as far as that?

A. That is the only lot I remember previous to that.

Q. How well posted do you keep in transactions of coffees that may reach this port either in a damaged condition from creosote or damaged for any

(Testimony of George W. Werlin.)

other reasons, or fermented. Do you keep posted on the sale of that coffee?

A. I hear and know of every such transaction. If there is one made by another broker and we do not happen to believe in the truth of it we ask one another. I do not hesitate to ask my competitors such questions, and generally I am answered.

Q. As far as you know was any other coffee coming from the "Santa Rita" and damaged by creosote sold here in this port?

A. It did not happen to come to my notice. It was only the Santos end of it that came to my notice.

Q. Did you ever hear of the sale of the coffee which came here by the "Santa Rita" consigned to Brandenstein & Company?

A. I heard that Brandenstein had some coffee on the "Santa Rita."

Q. Did you ever see that coffee?

A. No, nothing that belonged to Brandenstein.

Q. Did you have anything to do with the sale of that coffee? A. No, sir.

Q. Did you hear at what figure that coffee had been sold? A. Brandenstein's?

Q. Yes. A. No, sir.

Q. Did you hear at what figure that coffee had been purchased from Brandenstein?

A. Well, that would be the same as the first question, if I understood you right.

Q. I mean sold here in the market. You don't know anything at all about that consignment?

(Testimony of George W. Werlin.)

A. No, sir.

Q. And you don't know what became of that coffee, do you? A. Brandenstein's?

Q. The Brandenstein coffee.

A. I understand it was part of the coffee that Lewin purchased; it might have been included in the Lewin purchase, but I don't know.

Q. As far as you know it was included in the Lewin purchase? A. Probably.

Q. At 5¼ cents a pound? A. Probably.

Redirect Examination.

Mr. DENMAN.—Q. When a person begins to deal in this market in San Francisco and to actually handle coffees of that grade and put it on the market he does it pretty quietly, does he not?

A. Yes; he does not advertise it, if a roaster buys it.

Q. And possibly a sale of the Brandenstein coffee might have been made to a roaster without your hearing anything about it on account of that attempt to keep it quiet? A. Yes.

Recross-examination.

Mr. KNIGHT.—Q. There might have been other coffees which were similarly damaged, which of course you would not know anything about?

A. Not if it arrived by sea. It would be a very funny thing if I did not hear of it.

Q. So that although the sale of this coffee is not advertised yet it is generally known?

(Testimony of Carl Schilling.)

A. No, that would not follow. The question I was trying to answer was, our clerks are always upon the docks more or less and at the warehouses, and they hear those things.

[Testimony of Carl Schilling, for the Libelant.]

CARL SCHILLING, called for the libelant, sworn.

Mr. DENMAN.—Q. Mr. Schilling, what is your occupation?

A. Member of the firm of A. Schilling & Company, dealers in tea, coffee, spices, baking-powder, etc.

Q. Are you in charge of any particular department there? A. The coffee department.

Q. And were you connected with the firm at the time of the arrival of the "Sonta Rita" in this port?

A. Yes, sir.

Q. Were there certain coffees on that vessel consigned to you?

A. Some 500 bags of what was called Mexican coffee.

Q. Do you recollect examining that coffee at the time of its arrival?

A. I did not see the coffee at the time of its arrival.

Q. When had you purchased that coffee?

A. I had purchased that coffee somewheres around the 15th of September, 1906, on a sample.

Q. What was that coffee worth in San Francisco at the time of the arrival of the vessel?

(Testimony of Carl Schilling.)

A. In sound condition?

Q. Yes.

A. I should say 11½ cents.

Q. How long have you been in the coffee business?

A. I have been in the department there about five years.

Q. How long have you been familiar with the coffee business? A. Well, say, 6 or 7 years.

Q. Will you examine this coffee in the bag here and smell it and tell me whether you can detect any odor other than the coffee odor?

A. Very slight, but creosote.

Q. Will you taste it?

A. Very decidedly damaged.

Q. What is the nature of the damage?

A. Why, what we commonly call creosote.

Q. Now, will you kindly smell the coffee in the cup covered with the tin?

A. That is creosote, very strong.

Q. Is that coffee available for roasting purposes in the San Francisco market?

A. Not in our business.

Q. Would any reputable dealer in San Francisco use such a coffee as that for roasting purposes?

A. No, sir.

Q. Is there any commercial purpose in San Francisco that you know of to which that coffee could be put?

A. No reputable purpose. A man might buy that coffee with the object of mixing it in with a lot of

(Testimony of Carl Schilling.)

other coffee, and he would take his chances that the taste or the damage of the creosote would not be detected.

Q. Do you think he would be able to succeed?

A. No, sir.

Q. Would that be an honorable practice, to do that? A. It certainly would not.

Q. Would 5¼ cents be a fair price for that coffee in January, 1907?

A. I think it would be a very high price.

Q. Do you think the coffee is worth that much?

A. No, sir.

Cross-examination.

Mr. KNIGHT.—Q. You think that 5¼ cents would be a high price? A. I do.

Q. Of course when you speak of the price of the bean you have reference to the fact that it is going to be available for some use; otherwise, if it is not available, it would have no figure at all, be so much junk, so much refuse. A. Yes, sir.

Q. Now, have you ever known, Mr. Schilling, of coffee damaged to a certain extent being mixed with other coffees and sold here generally for consumption?

A. What kind of damage do you refer to now.

Q. That is what I want to get at from you. What is the character of the damage which will limit the use of coffee. Take fermented coffee, what do you say as to fermented coffee?

A. Fermented coffee is used by some people for some purposes.

(Testimony of Carl Schilling.)

Q. That is they are mixed with some coffees and are lost in the general mixture.

A. No, they are not lost in the general mixture. Nine times out of ten when fermented coffees are bought they are bought unwillingly, the people don't know they are fermented.

Q. Isn't it possible to detect the fact that coffee has fermented if it has fermented to any extent whatsoever?

A. Yes, it is possible to detect it in the taste, not always in the smell.

Q. So that if detected after it has been purchased and been unwillingly purchased by a dealer, he uses it as he would endeavor to pass off a piece of counterfeit money, get rid of it.

A. A reputable dealer, if he finds it out, and he has not mixed the coffee, would insist upon the seller taking the coffee off his hands, cancel the sale.

Q. Now, speaking of the coffee trade generally, you find fermented coffee used, do you, in connection with coffees that are unfermented, and perhaps put out to the trade or sold for general consumption possibly at a little less figure than the coffee would bring if it did not contain that fermented coffee?

A. I would not like to answer that question, for this reason, that I can speak only from what we do, we don't buy fermented coffees. As far as other people's coffees are concerned, they don't come to our notice excepting in the roasted state, and when in a roasted state we have no way of knowing they

(Testimony of Carl Schilling.)

are straight, generally speaking, or whether the coffees are blended.

Q. So that you would have no experience with coffees that reached here in a damaged condition as far as their use to the trade or the general public is concerned?

A. Only in a general way. I would know, of course, as far as we are concerned. I know that there have been times when we have had in our place damaged coffees, damaged by all kinds of things.

Q. What have you done with them?

A. It depended entirely upon what the damage was.

Q. It would depend too partly upon the quantity of the damaged coffee, would it not?

A. There are certain kinds of damaged coffee that you can't do anything with; there is no use in trying to do anything with them.

Q. Take damage such as by creosote, have you ever had any experience with coffee damaged by creosote; assuming, of course, it has been damaged by creosote, have you ever had any experience with the handling of coffees damaged in that way?

A. I have a recollection of a few years ago buying a line of coffees, some few lots, which were damaged, and I asked them to cancel the sale.

Q. By what steamer had they come in here, do you know? A. I have no idea.

Q. Was the sale canceled?

A. The sale was canceled.

(Testimony of Carl Schilling.)

Q. So that as a matter of fact then, Mr. Schilling, you have had no experience with the handling of coffees damaged by creosote? A. No, sir.

Q. Not at all? A. No experience.

Q. All you mean to be understood as saying is this, that as far as the practice of your house is concerned you would not use a coffee that had been damaged in this way for the purpose of mixing it with other coffees and putting it out and offering it for sale? A. I would not.

Q. That is the extent of your testimony in that respect? A. Yes.

Q. Now, why do you say that 5¼ cents is a high price, Mr. Schilling, for that coffee, if you have had no experience in handling coffees of that kind? Where do you get the basis for your judgment as to value?

A. I get the basis of my judgment because I am around the brokers almost continually, and I have been in the habit of going down once a day. I know nearly every sale of the brokers of every lot of coffee that they have.

Q. Do you go around to various brokers?

A. I go around to the various brokers. I know the value because I have access to their price lists; I know the value of a coffee when it is sound; I know the value of a certain amount of coffee, for instance, that is fermented, or another lot of coffee may be slightly fermented, and another coffee may be Rio, another lot of coffee may be strongly fer-

(Testimony of Carl Schilling.)

mented, and so from a sound coffee to a damaged coffee we have a general idea as to valuation.

Q. Why do you keep posted or why do you take any interest in the value of damaged coffee if you do not handle them at all?

A. We do not excepting we cannot help but notice; the samples are all together.

Q. The samples are together?

A. The samples are all kept together and you cannot always tell a damaged coffee by looking at it. We do not buy coffees that way.

Q. How do you buy coffee?

A. We buy them entirely by test.

Q. And you do test a coffee before you buy it?

A. Always.

Q. And you do find here on the market right straight along damaged coffees for sale, damaged in various ways? A. Damaged in various ways.

Q. There is a market here for damaged coffee, is there not?

A. As I said, the coffees are sold to some one. I think the sale is generally made, the party buying not knowing that he is getting damaged coffee.

Q. Well, do I understand you to say that there are some people in the coffee business who take the word of a coffee broker entirely as to the coffee?

A. No. At the same time I can explain that in this way: there are certain characters of coffee which are sold on the green; it may be possible for other houses to buy coffee, I presume they do, with-

(Testimony of Carl Schilling.)

out testing it. I believe that is the general practice in the east.

Q. To buy coffees without testing them?

A. I have mentioned that we bought coffee on our testing; I only refer to our house when I say that. I don't want to go on record as saying that every house does.

Q. You don't want to be understood as testifying to the experience of any other house than your own house? A. That is right.

Q. You do know that there is offered for sale here right along and in the hands of brokers coffee that is more or less damaged, and damaged in various ways? A. Yes, sir.

Q. But what becomes of that coffee you don't know? A. Only from hearsay.

Q. Hearsay, from talking to the brokers who sold it? A. Yes.

Q. You know that they dispose of it?

A. They dispose of it, I feel sure, because the coffee is gone.

Q. The stacks of damaged coffee do not keep accumulating here; as far as you know it is not all thrown in the bay? A. No, sir.

Q. Now, you say that this was Mexican coffee, it was not Santos coffee?

A. It was sold to us as Mexican coffee.

Q. Was it Mexican or not?

A. I would not like to say.

Q. Who sold this to you, Arbuckle?

(Testimony of Carl Schilling.)

A. Arbuckle Brothers made the shipment. The sale was made to me through C. Bickford & Co.

Q. They held this out as Mexican coffee?

A. The sample was submitted to me as Mexican coffee.

Q. Was it, as a matter of fact, Mexican coffee?

A. I would not like to say.

Q. Do you mean that you cannot say or that you would prefer not to testify?

A. I would prefer not to testify. I simply have an idea on the subject. It is two years ago, and I would not like to go on record and say that was a Mexican coffee or that was a Santos coffee.

Q. Aren't you reasonably sure, Mr. Schilling, and don't you believe to-day that that was Santos coffee that you bought?

A. I am reasonably sure that was a Mexican coffee we bought.

Q. That it was a Mexican coffee?

A. Yes, sir.

Q. Why have you had this disinclination to testify regarding the character of the coffee?

A. Simply because I have repeatedly seen coffees sold from the east to the west which were represented to be one thing and turned out to be another.

Q. Was this coffee in any way misrepresented to you? A. Not that I know of.

Q. Not that you know of?

A. No. You understand I did not see the coffee.

Q. You never saw the coffee?

(Testimony of Carl Schilling.)

A. I did not see the coffee when it arrived.

Q. Now, you spoke of the value of that coffee being 11½ cents a pound? A. Yes, sir.

Q. What was it purchased for in New York, Mr. Schilling?

A. I do not understand what you mean.

Q. What was the coffee, this particular lot of coffee, purchased for?

Mr. DENMAN.—Q. The New York price.

Mr. KNIGHT.—Q. What was it purchased for?

A. You mean the amount?

Q. What was the amount, the price?

A. Ten and three-eights cents.

Q. Purchased at 10 3/8 cents?

A. Yes, f. o. b. New York.

Q. That was from Arbuckle?

A. That was from Arbuckle, yes.

Q. Do you sell retail as well as wholesale?

A. No, only wholesale.

Q. Does it make any difference in your price as to the quantity that you sell? A. Yes, sir.

Q. When you speak of 11½ cents do you mean that was the lowest or the highest figure that you would sell that coffee if it was Mexican?

A. I did not say "sell," I said it was worth that much money. I mean to say that I would have paid out to replace any stock of coffee that was like that in sound condition that amount of money.

Q. Was there just at that particular time any shortage of Mexican coffee here in the market?

(Testimony of Carl Schilling.)

A. We do not buy coffee in that way. It makes no difference to us where they come from; the fact that this was Mexican coffee would not make any difference to us.

Q. Of course, you are governed as to what you would pay for coffee by the condition of the coffee market, that is, as to the supply of coffee available here in this market at any given time, are you not?

A. Yes, sir.

Q. The price of coffee varies from time to time according to the supply of coffee in the market?

A. Yes, sir.

Q. Was the market particularly short just at that time of coffee?

A. Yes, it was after the first and the stocks were depleted, and we were buying east, like every other house, I presume.

Q. Now, right after that there was considerable coffee came into the market and the prices dropped, did they not?

A. I left right after the arrival of the "Santa Rita" and went to South America.

Q. How long were you away?

A. I was away about three months.

Q. When you returned what condition did you find the coffee market in?

A. I don't remember.

Q. As a matter of fact, had not the coffee market weakened considerably from the time that the "Santa Rita" arrived to and including, say, the following fall—hadn't there been a drop in the price of coffee?

(Testimony of Carl Schilling.)

A. I would not like to answer that without referring to my records.

Q. You are not able to testify from your recollection? A. Not from my memory, no.

Q. Mr. Schilling, in what weight bags or covers does such coffee as this coffee arrive here?

A. Why, it has come to us in all kinds of bags. We have had single bags, that is the ordinary sack cloth; and we have had double bags, and then we have had bags made of twine like a net, a bag of twine.

Q. Do you know what the weight of the coffee in the bags that come to the market are by sea?

A. I presume about 137 pounds.

Q. About 137 pounds?

A. They might run to 150.

Q. They might run to 150?

A. They might run to 150.

Q. The bag for holding the coffee is generally of a stout material, isn't it? A. Yes, sir.

Mr. DENMAN.—Mr. Oliver, I have here the invoice of New York weights that you and I had in our negotiations before, and it says 77,204 pounds in the 500 bags.

Mr. OLIVER.—That is 154 pounds to a bag. That is what I said before: I do not understand that at all. I have seen a great many thousand bags of coffee myself, and I have never seen coffee that would go that weight. I have seen it go that much when repacked, but I have never seen it go that much when brought here. I have taken large bags, coffee bags,

(Testimony of Carl Schilling.)

28 by 40, and weighing from 2 to 3 pounds, and we have sold them, including them with the coffee at the same price, but now I believe there is something allowed for it. Formerly it was that way. In the bags that I have seen, sometimes a bag that would be extra full would run about 143 to 145 pounds. In some of the Brandenstein coffee there was one lot that ran about 143 or 144 pounds.

Mr. DENMAN.—Some of the Brandenstein or Leege & Haskins?

Mr. OLIVER.—Some of the Brandenstein. I had nothing to do with the other. I never saw the other at all. The Brandenstein is the only one I had to do with. In this case these were heavy bags. That runs 154-odd pounds to the bag, which to me is extraordinary, coming in an ordinary burlap grain bag, an ordinary 10½ or 11 ounce bag; it was extraordinary that the freight clerk in New York should have received it. He did make a notation on his bill of lading "in single bags." He failed to put in the saving clause. It should have been, and, as I told you before, one coffee man here in San Francisco said that they ought to have lost the whole thing in shipping it in such bags. The bags that come from Guatemala are 2½ to 3 pound bags. That is what I call an A bag. It is a heavy, double bag. This was an ordinary grain bag.

Mr. DENMAN.—Is there the same stipulation in regard to this as in regard to the other? This is a part of the original negotiations.

(Testimony of Carl Schilling.)

Mr. OLIVER.—I do not understand that; 154 pounds is extraordinary to me. Still it may be so. But as there were no weights, nobody had a chance of checking the weight at all.

Mr. KNIGHT.—You can offer that for what it is worth, because as long as there is a discrepancy we shall simply reserve an objection to it.

Mr. DENMAN.—This is a part of those two matters that Mr. Oliver and I had our original discussion over, and we then determined that we would rely on these New York returns of weight. This is by the same weigher, the same thing that we agreed on in the Leege & Haskins case, the same return. Of course, if there is any question about that, I admit that that in itself is not sufficient evidence of the weight; we would have to take our depositions in New York.

Mr. KNIGHT.—I understand that you and Mr. Oliver had a discussion respecting a possible settlement of the damages in these cases and that he agreed at that time that as far as the weight was concerned that he would take the return of Arbuckle & Company. Now, it seems that all that fell through. We, however, did not want to raise any question, and admitted, as I recall it, in the Leege & Haskins case —you can correct me if I am mistaken—that the Arbuckle return would be taken as to the weight of the coffee, inasmuch as it seemed there to be more reasonable, but in view of the fact that the coffee weights here are far more than we understand is ordinarily the weight of coffee, I should not feel dis-

(Testimony of Carl Schilling.)

posed to admit that that statement or return of Arbuckle & Company contains the true weight of the coffee. Now, Mr. Oliver, have you taken any steps to ascertain from Arbuckle & Company or from your people in New York whether or not that weight was correct? As I understand, there is no bill of lading.

Mr. OLIVER.—It does not accord with the bill of lading at all. The man who received that coffee is in San Francisco; I think he arrived last night; that is George W. Grayson. He is in the Metropolis Building. He has been east for the last four or five weeks. Now, I want to see him and find out where he got that weight from on that bill of lading.

Mr. KNIGHT.—If you can verify that information through Mr. Grayson, we are perfectly willing to let it go in as proper evidence, but I would want to have it verified, under the circumstances.

Mr. DENMAN.—Q. Mr. Schilling, is that the weight statement that you received from Arbuckle concerning this shipment?

A. Yes. This is the statement that we received and on which we paid the bill.

Mr. KNIGHT.—We object to that on the ground that what Mr. Schilling might have received from Arbuckle is not competent evidence in the case. I do not know whether it is worth while making objections. As a matter of fact, they are not passed upon.

The COMMISSIONER.—I do not pass upon them. They are matters that the Court itself will review. I will let this be introduced in evidence and

(Testimony of Carl Schilling.)

I will mark it as an exhibit, and it will go in for what it is worth.

Mr. DENMAN.—If Mr. Knight and I cannot agree I will have to send east and take a deposition as to the exact weight shipped. My understanding was, I may be mistaken, that these weights would be accepted. There was nothing binding on that; Mr. Oliver was not bound by that; it was part of the negotiations which fell through. My understanding was, when we commenced this hearing, that these weights would be accepted. If I am mistaken on that and we cannot agree, we will have to take the deposition in New York.

The COMMISSIONER.—As I understand there is other evidence in the record with reference to the weights.

Mr. DENMAN.—We have stipulated with regard to the Leege & Haskins coffee.

The COMMISSIONER.—That is what I asked for when the matter was argued; that is, the figures as to the shortage and the weights.

Mr. DENMAN.—In the Leege & Haskins case there is no question. The question now arises as to the Schilling coffee, and Mr. Oliver is surprised at the amount contained in each bag and wants to verify it, as I understand.

Mr. KNIGHT.—Q. As I understand, you did not see any of this coffee? A. Not on arrival.

Q. Nor did you see the sacking in which it was contained?

(Testimony of Carl Schilling.)

A. Not to my recollection; no. Between the time that the "Santa Rita" came in here and when I went away I was busy and some other youngster in our firm attended to the coffee, and I belive turned it over to Mr. O'Brien to dispose of as he thought best —some such arrangement as that.

Q. Did you make any investigation, Mr. Schilling, as to what this coffee could be sold, for, this particular coffee? A. No. sir.

Q. You did not? A. No, sir.

Q. You did not attempt yourself to make any disposition of it?

A. I did not do anything about it.

Q. Or interest yourself in any way in the disposition of the coffee? A. No, sir.

Mr. DENMAN.—Q. Mr. Schilling, what are the customary terms on which coffee is sold in regard to the percentage for cash? A. Two per cent.

Q. Two per cent for cash?

A. In 10 days.

Q. In speaking of 5¼ cents that means 5¼ cents for the coffee less 2 per cent for cash?

A. Two per cent for cash if paid in 10 days.

Mr. KNIGHT.—Q. Is that the rule with reference to damaged coffee?

A. That is the rule with reference to any sale.

Q. Any sale? A. Yes, sir.

Q. So it makes no difference whether it is damaged or not?

A. It makes no difference whether damaged or not.

(Testimony of Joseph O. Falkinham.)

Mr. DENMAN.—Q. That is a custom of the coffee trade? A. Yes, sir.

[Testimony of Joseph O. Falkinham, for the Libelant.]

JOSEPH O. FALKINHAM, called for the libelant, sworn.

Mr. DENMAN.—Q. What is your occupation, Mr. Falkinham?

A. Clerk for C. Bickford & Company.

Q. Do your duties as clerk require the handling of coffee? A. They do, yes.

Q. How long have you been in the coffee business? A. Fourteen years, approximately.

Q. What are your special duties with regard to the coffee that Mr. Bickford handles?

A. I do a great deal of the warehouse work, and also considerable office work, more or less.

Q. What is the warehouse work?

A. It consists of going down and examining coffees, and submitting samples to the office according to the marks, and if necessary, the coffee has to be overhauled in the warehouse according to the grades.

Q. Do you recollect the arrival of the "Santa Rita" in the port of San Francisco in January, 1907?

A. I do.

Q. And that a quantity of coffee was taken from the "Santa Rita" and afterwards sold to Leon Lewin? A. I do.

Q. About how many bags of coffee?

A. Approximately 1500 bags.

(Testimony of Joseph O. Falkinham.)

Q. Was there any Santos coffee in that lot?

A. There was.

Q. Was there any Mexican coffee?

A. As we know coffee, there was Santos and Mexican.

Q. Could you determine that from the character of the coffee and the sack and other evidence you had there? A. Almost to a certainty.

Q. What was the character of the Mexican coffee; was it high grade or low grade coffee?

A. It was a better grade of coffee; it was large full beans.

Q. How many samples did you take of the coffee?

A. I inspected every bag that was put into the warehouse.

Q. The whole 1500 bags or thereabouts?

A. Yes, sir.

Q. Was that coffee injured? A. It was.

Q. By what?

A. By a foreign odor, I will say similar to creosote, or similar odors.

Q. Will you kindly smell the coffee contained in this jar marked Libelants' Exhibit 2, and tell me whether you ever noticed that odor before?

A. (After examination.) I have. It is similar to the odor of the coffee of the "Santa Rita."

Q. Was the "Santa Rita" coffee as badly damaged as that?

A. I would say, being right with the coffee, if anything, it was worse.

(Testimony of Joseph O. Falkinham.)

Q. You think, then, if this were a sample from the same coffee that it has improved or lost odor in the interim? A. That would be my opinion.

Q. Now, could you by roasting get that odor out of that coffee?

A. My experience is that you could not eliminate but a very small percentage of it.

Q. Did you make any attempts by roasting to get the odor out of the "Santa Rita" coffee which you examined? A. Did I?

Q. Yes. A. No.

Q. Did you see anything done?

A. Yes, sir.

Q. What was done?

A. It was roasted and cupped in our office.

Q. On those samples that you brought there?

A. On those samples that I submitted.

Q. And that was made up from these 1500 bags that you examined? A. It was.

Q. Were you successful in getting the odor out of it? A. I was not.

Q. Were any of those attempts that you saw successful?

A. No attempts were successful that I know of.

Q. Were those samples samples that you submitted to Mr. O'Brien from your office?

A. Those were the samples.

Q. And also Mr. Bickford?

A. I submitted them to the office.

Q. You submitted them to the office?

(Testimony of Joseph O. Falkinham.)

A. To the office, and they passed through their hands.

Q. Mr. O'Brien and Mr. Bickford were in the office at that time, were they not?

A. I don't remember whether Mr. Bickford was there or not. He was sick a great deal along about that time.

Q. Was Mr. O'Brien there? A. Yes, sir.

Q. Was it he that made the roasting of these samples?

A. He had the principal charge of it.

Q. With regard to coffee bags, the size of coffee bags in this port, do they vary? A. They do.

Q. Between what sizes?

A. There are cars of coffee packed in 100 pounds, and other bags as high as 208. They have different weights between those.

Q. Is 154 pounds of coffee in a sack an unusual sack of coffee in size?

A. It is nearer an average.

Q. It is nearer an average? A. Yes, sir.

Q. Do you recollect whether or not any of these Mexican coffees were in bags weighing 154 pounds or thereabouts?

A. They weigh about from 130 to 155.

Q. You are referring now to the whole 1500 bags?

A. No, to the Mexican; that was the question asked.

Q. To the Mexican? A. Yes.

Q. Will you look over that statement marked Libelants' Exhibit 1 in the Schilling case (handing.)

(Testimony of Joseph O. Falkinham.)

Could you say to the best of your recollection that that would be a fair summary of the bags of Mexican coffee that you had there?

A. I would consider this correct.

Q. You have no very definite recollection in regard to the exact figures of the different bags?

A. No, sir.

Q. Simply by the weight of the bags as you saw them, their heft, and handling them?

A. Yes, sir.

Q. By the way, there are columns of 14 here. Does that mean that 14 bags were weighed at once to get this weight?

A. Fourteen bags to the draught.

Q. That is 14 bags are piled together and then afterwards the weight is given of the 14 bags: is that right?

A. No. Fourteen bags was probably weighed on a steelyard, what they call out here T scales; and those 14 bags were weighed.

Q. And the figures 2,148 pounds represent 14 bags? A. That would be the gross weight.

Q. Of those 14 bags? A. Yes, sir.

Q. Are you familiar with the values of coffees in the port of San Francisco?

A. I am to a certain extent.

Q. Would you consider 5¼ cents a pound a fair price for these damaged coffees that you examined?

A. I would consider that ample.

Q. You would consider that an ample price?

A. Yes.

(Testimony of Joseph O. Falkinham.)

Q. How long have you been in the coffee business?

A. Fourteen years.

Q. Have you ever seen any coffee come into this port as badly damaged as this coffee was by creosote?

A. Yes, sir.

Q. What was the nature of the damage?

A. Very similar, I believe, also creosote, of sheep dip, which is very similar.

Q. Do you know anything about the history of those coffees, how they are sold?

A. They came in on the Pacific Mail Steamship Company's steamer, and the steamship company eventually had to take the coffee, because I believe it was discovered that some casks of sheep dip got bursted open on board the ship. The coffee was eventually stored in the front story warehouse and was kept underneath the sidewalk there.

Mr. KNIGHT.—I move to strike that out as immaterial, irrelevant and incompetent.

Mr. DENMAN.—Q. Do you know of your own knowledge the exact figure at which that coffee was ultimately sold for?

Mr. KNIGHT.—The same objection.

A. I never knew of the final disposition of the coffee.

Mr. DENMAN.—Q. Is there any legitimate commercial use to which that coffee could be put in San Francisco? A. I know of none.

Q. It could be slipped into other coffees as a bad mixture, couldn't it?

(Testimony of Joseph O. Falkinham.)

A. Well, very little likelihood of that being done on this coast.

Q. Why?

A. The nature of the coffee used here is quite different from the bulk of the coffee used on the New York coast.

Q. How is that, on account of the different method in buying?

A. No. They do very little cupping there. The larger part of the coffee houses there don't cup coffees, and they have also what they call a Rio coffee, which is extremely rank in the cup, and it would be possible to use a very small percentage of this coffee by blending it with Rio.

Q. With a rank Rio? A. Yes.

Q. The rankness of the Rio might conceal the injury to this coffee. A. Yes.

Q. Would that be an honorable thing to do, in your opinion?

Mr. KNIGHT.—I object to this witness testifying as to whether a thing is honorable or moral.

A. I do not like to answer that question either. I think if a person would sell that coffee and call attention to those blots and the other man is willing to give money for it, I think it is still honorable.

Mr. DENMAN.—Q. I am supposing this case. Suppose a man does not call attention to the blots and he passes it off as Rio coffee when as a matter of fact it is blended with the other, would you call that honorable?

(Testimony of Joseph O. Falkinham.)

Mr. KNIGHT.—Deception is never honorable. Let us admit that without taking up the time to take that kind of testimony.

Cross-examination.

Mr. KNIGHT.—Q. Santos coffee is the same as Rio coffee, is it not?

A. It comes from the same country, but is different.

Q. In what was is it different?

A. Santos coffee is free from the rank flavor found in Rio coffee. They are both separate provinces of Brazil.

Q. The Santos coffee is a stronger coffee, stronger, for instance, than the Mexican coffee?

A. It is not considered so.

Q. Isn't it stronger than the Bogota coffee?

A. I would not consider it so.

Q. You would consider then the Santos coffee was just as mild a coffee as any of these other coffees?

A. Well, I will have to explain. In any coffee, a new coffee, it is a good deal stronger and has more acid than the same coffee after it has become aged.

Q. I am taking coffees of a similar age. Now compare Santos coffee with Guatemala coffee, which is the stronger, both coffees being of the same age.

A. I would consider the Guatemala coffee stronger.

Q. The Guatemala stronger? A. Yes, sir.

Q. Now, Mr. Falkinham, did you ever weigh any of this coffee? A. Not on scales.

(Testimony of Joseph O. Falkinham.)

Q. Then you are not able to say what any of these bags weighed, are you?

A. Through years of experience, handling weights, and seeing a great deal of coffee that was weighed, it was on that that I based my testimony as to the weight of these sacks.

Q. Was this before any of this coffee had been resacked or after it had been resacked?

A. Both.

Q. Was there any difference in the weight of the coffee resacked from the coffee in the original sacks?

A. No appreciable difference.

Q. So it was the same weight of coffee in each instance, was it; that is, the sacks were about the same size and held about the same quantity of coffee; is that correct? A. Yes, sir.

Mr. DENMAN.—We do not contend, Mr. Commissioner, that Mr. Falkinham was in a position to swear as to the weight of this coffee, the pounds it weighed. The evidence was simply offered to satisfy Mr. Oliver that bags run up as high as 185 pounds.

Mr. KNIGHT.—Q. Mr. Falkinham, was this coffee sampled and sold on the wharf?

A. I cannot testify to that. I did not handle the coffee myself, until after it left the wharf.

Q. When you sampled it or when you handled it in the manner you have described, who owned it, if you know? A. I don't know.

Q. You don't know who did? A. No, sir.

Q. In what warehouse was it?

A. It was put in the Humboldt shed.

(Testimony of Joseph O. Falkinham.)

Q. All of it in the Humboldt shed?

A. All we handled.

Q. How much of it did you handle?

A. Approximately 1,500 bags.

Q. Do you know what time that was, what date, how long after the coffee had been taken from the wharf, if that will serve to refresh your memory?

A. Within one week.

Q. How long before the coffee left the warehouse?

A. Probably another week.

Q. So that the coffee was in the warehouse, to your recollection, about two weeks?

A. No, one week.

Q. It was a week in the warehouse?

A. It was a week before it went to the warehouse.

Q. When it was on the dock?

A. It was removed from the dock within a week after arrival.

Q. Did you take samples of the coffee there on the wharf?

A. I was not on the wharf at that time.

Q. So you had nothing to do with the coffee until after it got in the warehouse?

A. That is correct.

Q. Do you know when it reached the warehouse?

A. I can only say within a week after the arrival of the steamer.

Q. And then your work was performed during that following week, the week after it had arrived in the warehouse? A. That is correct.

(Testimony of Joseph O. Falkinham.)

Q. And then about a week after you figure the coffee left the warehouse?

A. Some of the coffee left the warehouse before I really was finished.

Q. It left at different times, did it?

A. Different days.

Q. When was it all out of the warehouse finally?

A. Within two weeks, I would judge, from the time of the discharging of the cargo.

Q. Now, you were doing the sampling for Mr. Lewin, were you not?

A. I have testified that I don't know who owned the coffee. I was doing it under instructions from my own office.

Q. But you don't know for whom you were ultimately working? A. No, sir.

Q. Now, what is the difference between Guatemala coffee and Mexican coffee?

A. There is not much difference.

Q. Is there any difference?

A. Without taking up particular lots, I would not say there was a difference.

Q. Now, I understand you to say that the "Santa Rita" coffee was damaged worse than the sample which was shown you in that closed bottle?

A. In my judgment the odor was stronger at the coffee than at the sample now.

Q. You got the odor from the coffee, I suppose, when all these bags were together in the warehouse; is that so? A. Yes, sir.

(Testimony of Joseph O. Falkinham.)

Q. Would your experience then lead you to believe that after that sample had remained corked for the length of time it apparently has that it had improved?

A. I believe a percentage of the odor has passed away.

Q. Now, take the stuff that is in that open bag and compare that with the stuff that is in the bottle. In your opinion is the coffee in the open bag more palatable and has it improved over the coffee that is in the closed bottle?

Mr. DENMAN.—You mean as to odor or palatability?

Mr. KNIGHT.—I say has it improved?

A. I would say that although the odor is not so strong in the bag as in the cup, the value of the coffee has not improved, because coffee of that nature can only be used in certain outlets.

Q. In certain outlets. What do you mean by "certain outlets"?

A. In the cheaper grades of coffee.

Q. Would they be sold by themselves or mixed in with other coffees and sold at a less price than the standard coffee would sell for?

A. Well, ultimately they would mix it in with other coffees before they went direct to the consumer.

Q. And then would be put out for consumption at a less price than the coffee would be sold for if undamages? A. Yes, sir.

Q. Now, damaged coffees are put on the market, are they not? A. They are.

(Testimony of Joseph O. Falkinham.)

Q. Do you know, Mr. Falkinham, what steps were taken to secure a customer for this coffee?

A. I do not.

Q. You had nothing to do with that?

A. No, sir.

Q. Do Bickford & Company handle damaged coffees? A. They do.

Q. Buy and sell them here in the market?

A. We never buy or sell coffee except as brokers.

Q. You simply handle damaged coffee as brokers?

A. Brokers wholly.

Q. On a percentage? A. Yes, sir.

Q. On a commission? A. Yes, sir.

Q. Have you ever handled any fermented coffee or have you had any experience with fermented coffee?

A. I am familiar with fermented coffee.

Q. How does the fermented coffee compare with this coffee as far as its palatability is concerned, its adaptability to ordinary consumption?

Mr. DENMAN.—I submit that the question is indefinite, because it does not state how badly fermented, and it is apparent there may be various grades of fermented coffee, some grades better and some worse.

A. I have seen fermented coffee I would consider of better value than that, and also fermented or poorer value.

Mr. KNIGHT.—Q. Depending on the extent of the fermentation?

(Testimony of Joseph O. Falkinham.)

A. Not only the extent of the fermentation but the grade of the coffee would also be taken into consideration.

Q. So that the value of damaged coffee is determined by two things, first the value of the coffee in its undamaged condition, and second, the character and extent of the damage.

A. Those things are taken into consideration and are noted at the time of buying.

Q. You have nothing to do with the sale of coffee, as I understand? A. No, sir.

[Testimony of Ben Levinger, for the Libelant.]

BEN LEVINGER, called for the libelants, sworn.

Mr. DENMAN.—Q. Mr. Levinger, what is your occupation?

A. I am with M. J. Brandenstein & Company.

Q. What business are they engaged in?

A. Importers and roasters of teas and coffees, rice and so on.

Q. What department are you interested in there?

A. Coffee.

Q. How long have you been in the coffee business?

A. About 10 years.

Q. Are you familiar with the values of coffee in this port?

A. Well, for my own information, I am.

Q. How many tons of coffee does your firm handle in a year, I mean in round numbers?

A. I would rather not answer the question unless it has some bearing on the case.

(Testimony of Ben Levinger.)

Q. It is a very large quantity?

A. A large quantity.

Q. So that you have a very considerable experience in the handling and pricing of coffee in the course of a year? A. Yes, sir.

Q. Do you recollect the arrival of the "Santa Rita" in this port in January, 1907?

A. Yes, sir.

Q. With the coffee consigned to you and other persons in this port here? A. Yes, sir.

Q. Do you recollect the character of the damage to the coffee?

A. Yes; that is our own coffee. I don't know about anything except our own.

Q. What was the character of the damage to your coffee?

A. Well, damage by a foreign odor, which I consider creosote or some similar thing.

Q. Would you be able to recognize the smell if you ran up against it again? A. Yes, sir.

Q. Will you examine this coffee contained in this bottle, Libelant's Exhibit 2.

A. (After examination.) I will say that was damaged by creosote.

Q. Is the same odor that you noticed in your coffee? A. As far as my memory serves me, yes.

Q. What would you say as to a market for coffees damaged such as that, the coffee contained in Libelant's Exhibit 2, in the port of San Francisco?

A. Well, personally, that is the firm of M. J. Brandenstein & Company, we would not handle that at all.

(Testimony of Ben Levinger.)

Q. Is there any legitimate use for such coffee in San Francisco in the ordinary coffee trade?

A. Of course, I don't speak from personal experience; whatever they would do or would not do I don't know.

Q. You are familiar with the coffee business in this city, aren't you? A. Yes, sir.

Q. You have to meet the other dealers and other brokers? A. Yes, sir.

Q. From that experience would you say that there is any legitimate use to which that coffee could be put in the ordinary coffee trade in San Francisco?

A. I would say there was not any legitimate use.

Q. What could be done with it?

A. It could be roasted and sold.

Q. It could be roasted and sold. Do you think you would find any market for it in San Farncisco?

A. Locally?

Q. Yes.

A. I don't think you could sell much of it. You might sell some; there is no trouble to sell one order but repeating orders are what count.

Q. You mean by that the purchaser of the first order would get on to the coffee?

A. Most likely, yes.

Q. Now, could that odor be gotten out of the coffee by any process that you know of?

A. Not to my knowledge.

Q. Would you say that 5¼ cents was a fair value for the coffee at the time of the arrival in port of the "Santa Rita"?

(Testimony of Ben Levinger.)

A. If the coffee had been mine at that time I would have accepted the bid if I could have gotten it.

Q. Would you have considered that a fair price for it? A. Yes, sir.

Q. The custom of the coffee trade here is 2 per cent off for cash in 10 days?

A. Unless otherwise specified. We have steamer days here, and we have got it cash less 2 per cent steamer days, say from the 13 to the 28th. That is a custom with us; of course there are exceptions.

Q. But when you say 5¼ cents, ordinarily that means 5¼ cents less 2 per cent off in 10 days?

A. Yes, on steamer days.

Q. Five and a quarter cents less 2 per cent off for cash would be a fair, or at least a good price for the coffee at the time of its arrival?

A. If it was for M. J. Brandenstein & Company I would have accepted that price right off the reel.

Q. You would consider it a good price?

A. Well, for M. J. Brandenstein & Company, when it came in, I would have accepted 5¼ cents to get rid of it.

Q. You did have some coffee on that ship?

A. Yes.

Q. What kind of coffee was it?

A. We had Santos, if my memory serves me.

Q. Would it make any difference in damaged coffee of that kind whether the original sound value of the coffee was 11½ or 10½ cents, as regards the value of the damaged coffee?

A. No, sir; not in my judgment.

(Testimony of Ben Levinger.)

Q. Did you ultimately make a sale of your damaged coffee? A. Yes, sir.

Q. What did you get for it?

A. I think it was around 6¼ or 6½; in that neighborhood.

Q. Do you recall the exact figure?

A. Not to testify to it. I know it was around that price. I think it was 6½ cents, but I am not sure as to that.

Q. Now, as a matter of fact, was it not 6 cents less 2 per cent?

A. I do not think so. Whatever it was you can get; you can phone down and get it.

Mr. KNIGHT.—I submit that that is hardly a fair question to put to this witness.

Mr. DENMAN.—Q. Can you testify positively as to that?

A. I cannot testify positively to that.

Q. Can you satisfy yourself by an examination of your accounts?

A. I could say exactly. The bill was issued and everything is on record.

Mr. DENMAN.—If there is any question about that—

Mr. KNIGHT.—There is no secret about that—

The WITNESS.—The broker has a contract.

Mr. KNIGHT.—Q. The broker has been here and testified? A. Yes.

Mr. DENMAN.—Q. About the time you sold that coffee you had incurred charges for warehousing, had you not? A. Yes.

(Testimony of Ben Levinger.)

Q. Also for turning over the coffee; there had been some repacking, had there not?

A. I don't think there was to M. J. Brandenstein & Company, if my memory serves me right. I think they put it in the warehouse, but it had to be put in sacks in order to get it to the warehouse.

Q. Do you recollect as to that?

A. No, I don't think we had any charges.

Q. But charges had to be incurred, did they not, before the coffee could be sold? A. Yes, sir.

Mr. KNIGHT.—Q. Incurred by whom? Incurred, I suppose by the man who purchased it.

A. There was a charge. There was storage charges and insurance and so on going against the coffee.

Mr. DENMAN.—Q. Did you pay the insurance charges?

A. I think our insurance man did for his own protection.

Q. The warehouse charges you paid, did you not?

A. I am not sure whether we paid it or how it was. I think that was settled at the final settlement.

Q. There was also interest accruing during that operation? A. Yes, sir.

Q. What is the rate of interest which you compute on a shipment of that kind?

Mr. KNIGHT.—We object to what the interest would be on a shipment of that kind.

Mr. DENMAN.—Q. What would it be? I mean about what.

(Testimony of Ben Levinger.)

A. You ask me the rate of interest. For clearing and carrying the coffee, and to be safe on the business, one per cent a month would be about the charge for it.

Q. One per cent a month?

A. That is about it, approximately.

Q. Does that one per cent a month include warehouse charges?

A. That includes warehouse charges, interest, insurance and a little loss in weight.

Q. By the way, would you have bought 1500 bags of that damaged coffee on a two-pound sample?

A. Would I have bought 1500 bags?

Q. Yes.

A. It depends who submitted the sample. If it was a good reputable broker I would buy 1500 bags on a pound sample.

Q. Suppose it was damaged coffee of this kind and you were in St. Louis, and you were sent on from San Francisco a two-pound sample, would you consider you were getting a fair basis on which to estimate the purchase of the coffee?

A. If the sample was properly drawn and the broker knew his business, it should be a fair sample.

Q. Then it depends upon who makes the sample in a case of that kind? A. Yes, sir.

Cross-examination.

Mr. KNIGHT.—Q. Mr. Levinger, that coffee that came in the "Santa Rita" to Brandenstein & Company was pretty badly damaged, was it not?

A. Yes, sir.

(Testimony of Ben Levinger.)

Q. And there was a lot of it here that was badly damaged, was there not?

A. Not to my knowledge.

Q. You did not see any fermented coffee?

A. No, sir.

Q. Are you able to state whether or not there was none that was fermented?

A. Not to my knowledge; there was no fermented coffee to my knowledge.

Q. Was any of that coffee mouldy?

A. Not that I can recall now.

Q. You are not able at this time to recall that any of that coffee was in a mouldy condition when it was on the wharf? A. No, sir.

Q. Are you able to state whether it was not?

A. I would not testify positively one way or the other, because I am not positive.

Q. You are not positive?

A. There might have been some mouldy beans in it because it was below.

Q. I am referring to the coffee particularly on the Steuart Street wharf. Recall, if you can, the condition of the coffee that was unloaded from the steamer on the Steuart Street wharf.

A. As far as I can recall there was no claim made on our part as to any mouldy coffee, or damage in that way.

Q. Did your claim specify how the coffee had been damaged?

A. Well, I think that they specified damage by creosote, fumes of creosote, something of that sort.

(Testimony of Ben Levinger.)

Q. But you are not able to remember as to whether or not there were any sacks of the coffee that were in a mouldy condition? A. No, sir.

Q. Did you see the coffee that was consigned to Schilling & Company and to Leege & Haskins?

A. No, sir.

Q. Now, you are not engaged in the business of buying or selling damaged coffee, are you?

A. No, sir.

Q. You don't know what is the going price for damaged coffee? A. No, sir.

Q. You would have taken 5¼ cents for this coffee because you were not engaged in the business of handling it? A. Yes, sir.

Q. You would consider it a damaged coffee and would therefore get out of it as well as you could?

A. A quick sale is desirable.

Q. You would not under the circumstances have been very particular then in endeavoring to get what might be the going prices for damaged coffee?

A. No, sir.

Q. Just got rid of it as soon as you could?

A. Get rid of it as quickly as I could.

Q. Perhaps to the first man that came along.

A. Well, of course, I would try to get all I could for it, but I would not let any deal go by; I would not have lost the deal. I would have tried to get more, but I should certainly watch that I did not let the deal go by.

Q. I understand you to say that not being engaged in this business you probably were not in the

(Testimony of Ben Levinger.)
position, would not have been in the position to get the same price for that coffee as if handled by somebody who is accustomed to buy and sell that kind of coffee?

A. They might have a certain outlet for this coffee, while I had no outlet whatsoever.

Q. You were insured on this coffee, were you not? A. Yes, we were insured.

Q. So that whatever your loss was was covered by insurance on this coffee?

A. We were insured. But as far as the particulars of the insurance are concerned, I would not be able to talk very much on that, because Mr. Cowe attends to all of the insurance for M. J. Brandenstein & Company.

Q. Don't you recall about how much insurance you had on this coffee?

A. I think we had insurance for $10,000.

Q. Ten thousand dollars?

A. Yes. That is, to the best of my memory.

Q. You say this was Santos and Bogota coffee?

A. Yes, sir.

Q. Now, Mr. Levinger, isn't there a difference between Santos and Mexican coffees?

A. Yes, sir.

Q. Quite a decided difference, isn't there?

A. There is a decided difference, taking coffees of equal age. I mean by that you can take a low grade of Santos, and vice versa.

Q. Taking equal grades of coffee of the same age, the Santos is considerably stronger than Mexican coffee?

(Testimony of Ben Levinger.)

A. The coffee business is a matter of opinion, but in my opinion the Mexican is a far superior coffee, and it is a much stronger coffee than the Santos.

Q. Now, how does the Santos and Rio coffee compare, that is equal grades and ages?

A. Well, Santos is a much better coffee than Rio is.

Q. How does it compare as to strength?

A. Santos is a better coffee. The Rio has a peculiar flavor and is used in certain districts, but the Santos is a much better flavored coffee.

Q. As I understand you, you have no experience with these damaged coffees; you don't know to what extent there is a market for them? A. No, sir.

Q. You wish to confine your testimony to the experience of your own house?

A. To M. J. Brandenstein & Company.

Q. You don't wish to be understood as giving any testimony bearing upon the experience of anybody else except your own house? A. No, sir.

Q. When you speak of that damaged coffee not having any legitimate use what you meant to say was that your house would not handle that coffee?

A. We would not turn it out.

Q. You are not prepared to testify as to what would be done by other coffee dealers in this market?

A. No, I could not say what other people would do.

Q. Nor do you pretend to state what is the proper legitimate or illegitimate character of the coffee trade here, do you? You do not set yourself up as

(Testimony of Ben Levinger.)

testifying to the ethics, the morality or immorality of selling coffee of this kind?

A. I do not. I am testifying as to the firm of M. J. Brandenstein & Company, and nobody else.

Redirect Examination.

Mr. DENMAN.—Q. You would have known if any considerable quantity of that coffee had been mouldy? You made a sufficient examination to determine that? A. Yes, sir.

Q. As a matter of fact it was not mouldy?

A. I would not say whether it was or was not, but I think if there had been any quantity of mouldy coffee I would have recollected it.

Q. Now, with regard to the insurance, you don't know whether that was insured against particular average or total loss, do you?

A. No, I don't. I know we had insurance for $10,000, approximately that amount.

Q. You don't know the character of the policies or anything of that kind as to whether it was particular average or general average or total loss or otherwise?

A. No, I could not testify to that at all.

Q. Now, as a matter of fact, was there any talk of the condemnation of the coffee at that time?

A. I don't know.

Q. Was there no talk of condemnation of that coffee at that time?

A. Well, there was some talk.

Q. And the coffee brokers were afraid that it might be condemned before they got it out of town, were they not? A. I don't know.

(Testimony of Ben Levinger.)

Q. Didn't you hear any discussion in regard to the possibility of condemning that coffee?

A. Not any discussion.

Q. How do you know that there was some discussion?

A. I know there was some talk amongst ourselves, that it might be done, that being in that condition that such might be the case.

Q. That is, on account of the—

A. On account of the condition of the coffee.

Recross-examination.

Mr. KNIGHT.—Q. Mr. Levinger, the talk was simply this: it was suggested by Mr. Henry Brandenstein to his brother that that coffee might be condemned?

A. The conversation might have sprung from that, but I would not know as to whether it did or not; I could not tell, it might have been and might not, I don't know. I know there was some talk.

Q. At your store? A. Yes, sir.

Q. Now, do you recall whether or not any of this coffee was musty? A. No, sir.

Q. You do not recall? A. No, sir.

Q. Do you know from what part of the "Santa Rita" that Brandenstein coffee came that was unloaded on the Steuart Street wharf?

A. I know it was a different part, but what part I don't know.

Q. It was unloaded after the coffee was unloaded at the Little Mail Dock, was it not?

A. Where is the Little Mail Dock?

(Testimony of Ben Levinger.)

Q. The Little Mail Dock is down by the Mail Dock.

A. They unloaded at the Steuart Street dock first and then unloaded some on the other dock.

Q. They unloaded the coffee that was taken out at Steuart Street after they unloaded the coffee that was taken out at the Little Mail Dock, didn't they?

A. I think they unloaded the other first.

Q. You think they unloaded the Steuart Street coffee first? A. Steuart Street was the last.

Q. That was the last to come out? A. Yes.

Q. That was deeper down in the hold of the "Santa Rita" than the coffee that was unloaded at the Little Mail Dock?

A. I don't know what position it occupied in the boat. I know it was unloaded afterwards.

Q. You never knew in what part of the ship this coffee was stowed?

A. Not the exact location; no, sir.

Further Redirect Examination.

Mr. DENMAN.—Q. By the way, this coffee that was sold somewhere between 6 and 6½ cents, to the best of your recollection, was there any other coffee mixed in with it besides this that came off the "Santa Rita"? A. No, sir.

Q. That was the coffee from the "Santa Rita"

A. Yes, sir.

Q. That was this one shipment that you had purchased from Arbuckle, was it not?

A. Yes. I purchased it myself from New York.

(Testimony of Ben Levinger.)

Q. There was only one quality of coffee, wasn't there?

A. That was Bogota and Santos coffee. There are different grades of Bogota and different grades of Santos.

Q. You had several grades of coffee?

A. Yes.

Q. Your recollection is that it was all oil injury and that there were no other injuries of any appreciable character in that coffee?

A. That was the main type of damage.

Mr. KNIGHT.—Q. Do you recall, Mr. Levinger, and isn't it a fact that after the arrival of the "Santa Rita" and along in the fall and summer of 1907 the price of coffee dropped somewhat in this market?

A. That would be a very hard question to answer because there are so many changes in things like that. You can tell very easily by referring to the records and get it exactly. There are statistics kept of that.

Q. You cannot testify then from your own independent recollection how the coffee market in the summer and fall of 1907 at this port compared with the market in the winter and spring of 1907?

A. I would not care to state, because it would be guesswork.

Mr. DENMAN.—Q. You would not say, would you, that there was a coffee market for that kind of coffee? Even if there was a depression and inflation, up and down on this coffee, this coffee had to be sold as you can sell it at the time?

(Testimony of Ben Levinger.)

A. That is my opinion.

Q. So that the rise and fall of the price of legitimate coffee, first-class coffee, in the market, would not probably affect this kind of coffee particularly, would they?

A. Getting right down to the lines of business, if there was a big drop in the market, a person would not pay as much for a damaged coffee as he would for a good coffee.

Q. Was there any such big drop in coffee between the spring and summer of 1907?

A. No. I would not say there was a big drop. There was no big drop that I can recollect of at that time.

(An adjournment was here taken until Tuesday, April 13th, 1909, at 2:30 P. M.)

[Testimony of Ben Levinger, for the Libelant (Recalled).]

Tuesday, April 13th, 1909.

BEN LEVINGER, recalled.

Mr. KNIGHT.—Q. Mr. Levinger. did I understand you to say that Brandenstein & Company never handled any coffee that was in any way injured?

A. Never used any.

Q. How do you use the term "use," in what connection?

A. Well, in a manufacturing way; we never handle any unsound coffee.

Mr. DENMAN.—Q. Never manufacture it?

A. No.

(Testimonv of Ben Levinger.)

Mr. KNIGHT.—Q. Do you buy and sell at times coffee that is not sound or coffee that has been damaged to any extent?

A. No, we don't. I will state the case to you exactly; we might buy coffee in a line, and upon cupping them find them to be fermented. If such is the case, we reject them.

Q. Have you ever acquired coffee knowing that it had been injured in any way?

A. How do you mean, if we have ever bought that kind of coffee?

Q. Yes.

A. Not to my knowledge, none that has been damaged.

Q. You have never then to your knowledge handled any of that kind of coffee—when I say "handled" I mean acquired and afterwards sold coffee that has been in any way damaged.

A. Well, there is damage to and damaged coffee. If you say "damaged," the coffee might come in a shipment or in a car of coffee from New York or some other port, and have damaged spots in it that could be cut out and thrown away and the rest of the coffee be all right. That portion would be considered as damaged coffee, but the damage could easily be segregated from the good.

Q. How do you handle coffee? Do you buy it coming here from a foreign port and then do all your own roasting?

A. We do all our own roasting.

(Testimony of Ben Levinger.)

Q. Do you handle coffee in any other way than in that way, buying your coffee, roasting it, and then disposing of it? A. We sell coffee green.

Q. Have you ever handled any damaged coffee in a green condition where you have received it and handled it and sold it? I don't mean that you palmed it off as good coffee, but disposed of it in whatever condition it happened to be?

A. We sold the coffee from the "Santa Rita."

Q. Of course you sold the coffee of the "Santa Rita" to a broker. You did not sell it to your own trade, did you? A. No, sir.

Q. You did not sell it to your own customers?

A. No, sir.

Q. I am speaking of the handling of the coffee to your own customers, among your own customers. I am asking you whether you have handled coffee that was green coffee that was damaged, where you knew it to be damaged, and where you disposed of it to your own customers as damaged coffee?

A. Your question is the same as it was before, and can only say as I did before as to damaged coffee.

Q. I do not mean segregating the damaged coffee from the good, simply handling the good and throwing away the bad. I mean have you actually disposed of the bad?

A. Not to my knowledge; we never have sold any damaged coffee to my knowledge like that.

Q. Could it have been done by your house without your knowing it? A. Not unless I was away.

(Testimony of Ben Levinger.)

Q. Do you remember the coffee that came in on the "Luchenback" in 1903, consigned to your house and to Leege & Haskins?

A. In 1903? What kind of coffee was it?

Q. It was on the "Luchenback," and there was a fire on the ship and the coffee was damaged by smoke, and fire and water?

A. I do not think, to my knowledge, we had any coffee on that.

Q. Are you quite sure you did not?

A. I am not sure one way or the other.

Q. Do you remember the general average that was made up? A. No, sir.

Q. You don't remember whether there was a general average made up of that loss? A. No, sir.

Q. You are not able to testify one way or the other then regarding any coffee from the Luchenback"? A. No, sir.

Q. You do not remember that Brandenstein & Company took over the coffee which it had consigned to it by that steamer from the insurance companies, at a small loss? A. No, sir.

Q. And handled it?

A. I do not personally know anything about it.

Q. You are not in a position to say that your house did it or not?

A. No, I could not say one way or the other.

Q. When did you connect yourself with Brandenstein & Company?

A. About 10 years ago; it was either 1899 or

(Testimony of Ben Levinger.)

1900. I used to be with the old firm; it used to be Adelsdorf, you know.

Q. What were you doing in 1903? Did you have the same relative position that you occupy now?

A. Not quite.

Q. What were you in 1903 with reference to the house?

A. I was with Brandenstein in the coffee department at that time.

Q. But you were not manager?

A. I was not as I am to-day.

Q. So that you probably would not be in a position of knowing then in 1903 what was done by your firm in connection with any particular shipment; it would not necessarily come under your supervision?

A. Not necessarily so, no.

[Testimony of Max Schwabacher, for the Respondent.]

MAX SCHWABACHER, called for the respondent, sworn.

Mr. KNIGHT.—Q. Mr. Schwabacher, what connection have you with Leege & Haskins?

A. Mr. Haskins' partner.

Q. You are a partner? A. Yes, sir.

Q. How long have you been a partner?

A. Since 1903.

Q. Do you recall the coffee that came to Leege & Haskins on the "Luchenback"? A. No, sir.

Q. You don't recall that?

A. No. It must have been right at the time I joined the firm, or prior to that.

(Testimony of Max Schwabacher.)

Q. What time in 1903 did you go into the firm?

A. 1st of March.

Q. Are you prepared to testify that there was no coffee received by Leege & Haskins on the steamer "Luchenback"? A. No, sir.

Q. While you were there? A. No, sir.

Q. You are not prepared to testify one way or the other?

A. No, sir; I am not familiar with that. In fact I do not handle the coffee end of the business at all.

Q. What does that?

A. Mr. Haskins handles that entirely. I am not familiar with that.

[Testimony of C. G. Cambron, for the Respondent.]

C. G. CAMBRON, called for the respondent, sworn.

Mr. KNIGHT.—Q. Mr. Cambron, I want to ask you whether or not there is in this port and has been for any length of time a market for coffee more or less damaged, that is, coffee that reaches this port that is not in a thoroughly sound condition?

A. Yes, sir, there is.

Q. Is that a well-recognized market?

A. Well, I have never seen a lot of coffee in 20 years that could not be sold for some price.

Q. It is sold in this market? A. Yes, sir.

Q. As a matter of fact, all of the damaged coffee that comes here that is not absolutely worthless is handled by brokers and people engaged in the coffee trade? A. Yes, sir.

(Testimony of C. G. Cambron.)

Q. And of course the price at which it sells—

Mr. DENMAN.—Do not lead him.

Mr. KNIGHT.—Q. Will you state what governs the price of such coffee; name the elements?

A. The market on low grade coffee at that particular time would be the sole governor of it. The market on low-grade coffee is practically laid down by the price of low-grade coffees in New York, and the market in San Francisco would be governed to a great extent by the cost of bringing such low-grade coffees to this market. It is not necessarily a fact that we are bringing those coffees from New York because we usually have sufficient low-grade coffee for the supply here. Quite frequently we have a great many more low-grades here than we want, and then it is the reverse; we ship those coffees away. If the coffee market is overcharged with low-grade coffee it is easier to dispose of it in some other market.

Q. And the price at which damaged coffees would be sold, of course, would depend more or less on the extent of the damage to the coffee?

A. Yes, sir.

Q. And the quality of the coffee and its condition? A. It depends upon its condition.

Q. By the way, Mr. Cambron, do you know what was the value of Mexican coffee in a sound condition, A1 Mexican coffee, at this port in the spring of 1907, that is, at the time the "Santa Rita" came in?

(Testimony of C. G. Cambron.)

A. There has been in the last three or four years no remarkable change in the price of high-grade wash coffees. The changes in the market would not amount to over 1½ cents a pound.

Q. Not over a cent and a half?

A. From the lowest to the highest during four years. I would not attempt to tell you at what time they were one price and when another, but in a general way, in 1907, the price of No. 1 wash Mexican coffee—

Q. 1907?

A. 1907, likewise 1906, 12½ cents, about.

Q. About 12½ cents? A. That is No. 1.

Q. How would that compare with Santos, for instance? A. At the same time or now?

Q. At the same time.

A. What kind of Santos?

Q. Well, the same relative grade of Santos?

A. There is no relative grades of Santos, compared with high-grade washed Mexican; you are dealing with two different coffees, one is washed coffee and the other an unwashed coffee. I can tell you about what No. 1 Santos was worth about that time.

Q. What was it worth?

A. No. 1 Santos, such as they would use here, 9½ to 9¾ cents.

Q. Nine and one-half to 9¾?

A. Yes; that is approximately. I could not remember back all those market changes, but it is approximately that.

(Testimony of C. G. Cambron.)

Q. Take coffee of the character of the Schilling coffee that came into this port via the "Santa Rita," taking that in its sound condition, and take the Santos coffee that came in in the Brandenstein shipment in sound condition, what would they be worth at that time?

A. As I remember the Schilling coffee, it was a grade higher than the Brandenstein coffee. It was a large flat bean, much larger bean than the Brandenstein coffee, a higher grade; it might have been graded a cent higher a pound than the Brandenstein coffee. I would much prefer not being placed on record regarding the Schilling coffee. My connection with it was very vague and very slight, and it is not fair to put me on record on that Schilling coffee.

Mr. DENMAN.—I object to the question because Mr. Cambron has said before he would be unable to give a valuation of any coffee except the Brandenstein coffee, because he had no opportunity of examining it.

The WITNESS.—I had no intimate connection with the Schilling coffee. I don't remember what I testified to before, but I certainly did not have a very close connection with the Schilling coffee, and I am simply telling you what I remember regarding them.

Mr. DENMAN.—My objection is based on this ground, that Mr. Cambron has already testified he was unable to place any price on the Leege & Has-

(Testimony of C. G. Cambron.)

kins or the Schilling coffee, because he had not been given an opportunity to examine it.

Mr. KNIGHT.—Q. If you did not have a chance to examine it—

A. Leave me out of the Schilling coffee; I had very little connection with it.

Q. What I want to get at from you is the extent to which there exists a market at this port for coffee coming here, damaged in such a way as to still make it eatable?

A. Well, it all has a market, every bit of it; and coffee very very much worse, 75 per cent worse than the coffee that was sold ex "Santa Rita" has been sold in this market, sold by me and sold by others. There is hardly any limit to the quality that could be sold at some kind of a price.

Q. Have you ever heard of any coffee being condemned by the pure food inspectors?

A. No, I never have. I know a lot of it that ought to be condemned.

The COMMISSIONER.—Q. Is that a joke?

A. A lot of coffee that ought to be condemned. Well, I guess, I had better shut up.

Mr. KNIGHT.—Q. Now, Mr. Cambron, if that is a joke—

The COMMISSIONER.—Q. This will all appear of record in the matter, Mr. Cambron. Was that a joke?

A. I simply said that as a casual remark; I did not intend that it should appear in evidence.

(Testimony of C. G. Cambron.)

Mr. KNIGHT.—If that was but a casual remark, I think it ought to be taken out of the record.

Q. Now, Mr. Cambron, we will have to call on you for an explanation of that remark. Had you reference to that coffee or coffee like that coming from the "Santa Rita"? A. No, sir.

Q. How badly was the coffee damaged to which you have referred?

A. I did not state what coffee, but I said coffee; coffee that had come into this market, quantities of it, that was 75 per cent poorer; I stated a moment ago 75 per cent poorer than the "Santa Rita" that has been sold by me and others. I said that a moment ago. And there is quantities of that coffee which could be very well disposed of.

Mr. DENMAN.—Q. That is, by burning?

A. Yes. But that is 75 per cent poorer, which leaves only 25 per cent margin. In other words, the cargo of the "Santa Rita" was 75 per cent better than that I refer to.

[Testimony of F. B. Oliver, for the Respondent.]

F. B. OLIVER, called for the respondent, sworn.

Mr. KNIGHT.—Q. I think you stated before in your examination that you were familiar generally with the conditions of the coffee market in this port?

A. Yes, sir.

Q. Will you state what you know regarding the existence, if at all, of a market for the handling of coffees that have been more or less damaged before they reached this port? Is there a market?

(Testimony of F. B. Oliver.)

A. There is a good market here.

Q. Has there been such a market for any length of time?

A. There is and was for eight years; I never had any trouble in disposing it at all. There is an instance right at hand at the moment of the "Indiana" coffees that are damaged more or less by submersion. Brokers even now, as I remember, who have said there was no market for it, are getting in line for the handling of those coffees at this moment.

Q. Although the "Indiana" has not reached this port.

A. The coffees are not out of the hold of the boat yet.

Q. That is the ship that went on the rocks?

A. Down in Magdalena Bay recently.

Q. Do you know of any other instances, Mr. Oliver, that would indicate the existence of a market here for those coffees?

A. I remember the case of the "Luchenback" coffee. Then there was the coffee that was damaged in the warehouse fire, that was nothing more than cinders.

Q. What fire was that?

A. Down in one of the warehouses, I have forgotten the name of it; it is down at the north end of the city.

Q. When did that occur?

A. About two years ago. I could find out exactly.

(Testimony of F. B. Oliver.)

Q. What happened there, the coffee was more than roasted?

A. It was all roasted; some of it was cinders. It was damaged by water, fire and smoke; that was sold. I have a sample of coffee here that I brought up with me, a very poor coffee.

Q. What sample have you?

A. It is coffee that was sent here from the east to sell. It is a very low-grade coffee, musty.

Q. How does it compare with the coffee that has been offered in evidence here from the "Santa Rita"? A. It is not as good. It is musty.

Q. Is that coffee for sale or been sold?

A. It is for sale now. The price at which that is held is 9¼ cents or 9½ cents in this market.

Q. And that has been damaged worse than this coffee in question? A. It is not as good.

Q. How was that damaged?

A. This is musty.

Q. Do you know the kind of coffee that is?

A. Santos coffee.

Mr. KNIGHT.—We will offer that as Respondent's Exhibit 1.

Q. Have you ever heard of the pure food inspectors condemning coffee?

A. Never heard of it.

Mr. DENMAN.—Q. This coffee is now on the market and for sale? A. Yes, sir.

Mr. DENMAN.—I move to strike out the testimony regarding this coffee as the selling price of water damaged coffee in the market in 1909 is not

(Testimony of F. B. Oliver.)

evidence of the value of creosote or oil damaged coffee in the month of January, 1907. I further ask that all this testimony be stricken out on the ground that it is immaterial, irrelevant and incompetent, it not having been shown that the two brands are in any way similar.

Mr. KNIGHT.—I would suggest that there is evidence that there has been no appreciable change in the price of coffee at this port in the last seven years, and we offer this for the purpose of meeting the testimony offered on behalf of the libelant that there was no market for coffees here that are damaged. We contend that there is just as well a defined market coffees in this port, wherever the coffees are eatable or palatable at all or where they could be used, as there is a market for sound coffee.

Cross-examination.

Mr. DENMAN.—Q. Mr. Oliver, how much of that coffee is there offered for sale?

A. I could not tell you; that is simply a sample that was given to me. How many bags there are in the lot I don't know. I did not ask; I could find out.

Q. May be 10 or 15 bags?

A. They would not take the trouble to send that quantity here.

Q. A carload, or how did it come out?

A. That is a sample of the coffee that was given to me.

Q. Is it coffee that is in New York?

A. I could not tell you where it is.

Q. You don't know where this coffee is?

(Testimony of F. B. Oliver.)

A. No, sir.

Q. It was a sample that was sent out here hoping it might be sold in San Francisco?

A. As San Francisco was a good market for such coffee.

Q. Then all you are doing is offering this as evidence or a sample of coffee elsewhere that might be sold—

A. I could not tell you whether it is elsewhere or not. I have told you I don't know how many bags there were in it.

Q. You know that is a sample of coffee that somebody would like to sell in San Francisco?

A. Yes, sir.

Q. That is all you know about it?

A. Yes. Regarding, as I said a while ago, the "Luchenback" coffee, I will be able to give further details of the valuation of that coffee.

Q. When was that, in 1903?

A. Yes, sir.

Mr. DENMAN.—We object to any testimony regarding that, as not showing the condition of the market in 1907, and also we object to it on the ground that at this period of time it would be impossible to show any relative figures as to the amount of injury to the two different coffees.

Mr. KNIGHT.—We offer the "Luchenback" coffee for the purpose of showing that Leege & Haskins and Brandenstein & Company have received coffee here damaged by fire, smoke and water, and have handled it as they would other coffee—I don't

(Testimony of F. B. Oliver.)

know how they handled it, but we will offer it for the purpose of showing they have handled that kind of goods in this market, and showing that there are certain attributes attached to this kind of coffee as well as to the others. If you insist that coffee of that kind cannot be bought and sold here as marketable goods, we will insist that that go in.

Mr. DENMAN.—We claim that it is irrelevant.

As I understand you will accept the weight as presented by Mr. Schilling.

Mr. OLIVER.—Yes.

Mr. DENMAN.—On the duplicate statement of weights.

Mr. OLIVER.—Yes. I have found out that those bags were made especially for that coffee; the coffee was not put into the bags until it came from Mexico.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY,

Libelant,

vs.

The Steamship "SANTA RITA,"

Respondent.

Stipulation Re Value of Coffee.

It is hereby stipulated by and between the parties hereto that the sound value of the coffee described in the libel on file herein was, on the arrival of the

steamer "Santa Rita" in San Francisco, in January, 1907, eleven and one-half cents per pound.

WILLIAM DENMAN,
Proctor for Libelant.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant of the "Santa Rita."

[Endorsed]: Presented and filed in open court June 3, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Claimant's Exceptions to the Report of the United States Commissioner.]

In the District Court of the United States, Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY (a Corporation),
Libelant,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,
Respondents.

EXCEPTIONS TO COMMISSIONER'S REPORT.

Claimant herein hereby excepts to the report of the commissioner heretofore made and filed herein, for the following causes, that is to say:

1. Because said commissioner finds that the value of the coffee in question, upon its arrival at the port of San Francisco was only five and one-quarter (5¼)

cents a pound, and that said coffee was not worth at least six (6) cents a pound, reducing the amount of damages found by the commissioner herein by five hundred and seventy-nine and 3/100 (579.03) dollars.

2. Because said commissioner has allowed the libelant interest upon the amount of damages found by him although no provision is made in the interlocutory decree for such interest, amounting to the sum of six hundred and sixty-seven and 6/100 (667.06) dollars.

3. Because, if interest be allowable, the commissioner has allowed libelant interest from the 30th day of January, 1907, to the date of filing said report, to wit, May 28, 1909, at the rate of six (6) per cent per annum, on a sum equivalent to the difference between ten and one-half (10½) cents a pound, as the sound value of said coffee, and five and one-quarter (5¼) cents a pound, which is found by said commissioner to have been its value upon its arrival at said port of San Francisco, on seventy-seven thousand two hundred and four (77,204) pounds, instead of allowing interest on a sum equivalent to the difference between said ten and one-half (10½) cents a pound and a sum not less than six (6) cents a pound, upon a like quantity, thereby reducing the amount of damages by the sum of seventy-eight and 16/100 (78.16) dollars, at least.

Dated, June 12, 1909.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimants.

Service of the within exceptions to commissioner's report and receipt of a copy is hereby admitted this 12th day of June, 1909.

WILLIAM DENMAN,
Per WM. B. ACTON,
Proctor for Libelant.

[Endorsed]: Filed Jun. 12, 1909. Jas. B. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Order Overruling Exceptions to the Report of the United States Commissioner, and Confirming the Report.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 6th day of August, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,642.

A. SCHILLING & CO.

vs.

Am. Str. "SANTA RITA," etc.

The exceptions to the report of the United States Commissioner filed herein June 3, 1909, having been heretobefore submitted to the Court for decision, now after due consideration had thereon, by the Court ordered that said exceptions be, and the same are hereby overruled, and further ordered that said report be, and the same is hereby confirmed.

[Order Confirming United States Commissioner's Report, and Overruling the Exceptions Taken Thereto.]

In the District Court of the United States, for the Northern District of California.

No. 13,642.

A. SCHILLING & COMPANY

vs.

American Steamer "SANTA RITA."

DE HAVEN, District Judge.—The report of the United States Commissioner, filed herein, June 3, 1909, is confirmed, and the exceptions to said report, filed herein by the claimant, are overruled.

[Endorsed]: Filed Aug. 6, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY,

Libelant,

vs.

American Steamship "SANTA RITA," Her Tackle, Apparel and Furniture and All Persons Intervening for Their Interests Therein,

Respondents.

Final Decree.

Issue being joined herein and this cause coming on duly to be heard, the libelants being represented by their proctor, William Denman, Esq., and the claimant, United Steamship Company, by its proctors, Charles Page, Esq., and Samuel Knight, Esq., and it being admitted at the hearing that the allegations of the libel as to the ownership of the cargo, its receipt by the vessel in good condition and its delivery in a somewhat damaged condition were true; and it being agreed that the question of the amount of said damages, in the event that the steamer "Santa Rita" be held liable for the damage, should be referred to a commissioner, and evidence being introduced as to the liability of the vessel for the said damage; and the Court finding that the said damage was not caused by leakage, breakage, contact with other goods and perils of the sea, or any of them, as alleged in the answer, or at all;

And the said matter being thereafter referred herein to Commissioner Francis Krull, to determine, ascertain and report the amount of said damage, and the said Francis Krull having ascertained and reported said damages as amounting to Five Thousand Four Hundred and Forty-three and 16/100 dollars ($5,443.16) as of the date of said report, to wit, the 28th day of May, 1909; and exceptions to the said report having been heard and overruled, and the said report by this court ordered confirmed;

Now, therefore, it is ordered, adjudged and decreed, that the said libelant, A. Schilling & Company,

do have and recover for the causes in the said libel mentioned, the sum of Five Thousand Four Hundred and Forty-three and 16/100 Dollars ($5,443.16), the amount reported to be due it by said commissioner, together with interest thereon at the rate of seven per cent per annum from the said 28th day of May, 1909, the said date of the commissioner's report, in the sum of $82.65, amounting in all to the sum of $5,528.81, together with its costs to be taxed.

And it is further ordered, adjudged and decreed, that unless an appeal be taken from this decree within ten days after notice of this decree to Messrs. Page, McCutchen & Knight, proctors for the claimant herein and a supersedeas bond staying execution be filed as required by law, the United Steamship Company and the United States Fidelity and Guaranty Company, the stipulator for the value on the part of the claimant of the said steamship "Santa Rita," cause the engagements of the said stipulation to be performed or show cause within four days after the expiration of said time to appeal, or on the first day of jurisdiction thereafter why execution should not issue against their goods, chattels and lands for the amount of this decree, with interest at said rate thereon according to their said stipulation.

Dated this 16th day of August, 1909.

JOHN J. DE HAVEN,
Judge.

Entered in Vol. 4, Judg. and Decrees, at page 310.

[Endorsed]: Filed Aug. 16, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY

vs.

American Steamship "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,

Respondents.

UNITED STEAMSHIP COMPANY (a Corporation),

Claimant.

Notice of Appeal.

To Libelant Above Named, and to William Denman, Esq., Its Proctor:

You and each of you will please take notice that the above-named claimant herein, United Steamship Company, hereby appeals to the next United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said circuit at the city and county of San Francisco, from so much of the final decree made and entered herein on the 16th day of August, 1909, as adjudges and decrees that said libelant do have and recover from the claimant the full amount of five thousand four hundred and forty-three and 16/100 (5,443.16) dollars, or any sum in excess of the sum of four thousand eight hundred and sixty-four and 13/100 (4,864.13) dollars, together with interest thereon and costs as provided in said decree.

And in and by said appeal the above-named claimant hereby gives notice that it desires only to review the question involved in said cause as to the value, at the time of its delivery to the above named libelant, of the coffee claimed herein to have been damaged.

Dated San Francisco, California, September 25, 1909.

Yours, etc.,
PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant and Appellant.

Receipt of a copy Notice of Appeal is hereby admitted this 27th day of September, 1909.

WILLIAM DENMAN,
By WM. B. ACTON,
Proctor for Libelant.

[Endorsed]: Filed Sep. 28, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY,
Libelant,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,
Respondents,

UNITED STEAMSHIP COMPANY (a Corporation),
Claimant.

Citation [Copy].

United States of America,—ss.

The President of the United States to A. Schilling & Company, Libelant, Against the Said Steamship "Santa Rita," Her Tackle, Apparel and Furniture, and Against All Persons Intervening for Their Interests Therein:

Whereas, the above-named claimant has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a portion of the decree recently rendered by the District Court of the United States for the Northern District of California, awarding said A. Schilling & Company the sum of five thousand four hundred and forty-three and 16/100 (5,443.16) dollars, together with interest and costs, and from so much of said decree as awards said libelant any sum in excess of four thousand eight hundred and sixty-four and 13/100 (4,864.13) dollars, together with interest and costs;

Now, therefore, you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco, State of California, on the 31st day of October, 1909, to show cause, if any there be, why said decree rendered against said appellant should not be corrected, and to do and receive what may appertain to justice to be done in the premises.

Witness the Honorable E. S. FARRINGTON, sitting for the Honorable JOHN J. DE HAVEN,

Judge of the District Court of the United States for the Northern District of California, this 1st day of October, 1909.

E. S. FARRINGTON,
District Judge.

Receipt of a copy of the within Citation is hereby admitted this 1st day of October, 1909,

WILLIAM DENMAN,
By WM. B. ACTON,
Proctor for Libelant.

[Endorsed]: Filed Oct. 1, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY, a Corporation,
Libelant,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,
Respondents.

Assignment of Errors.

Claimant herein hereby assigns errors in the proceedings of the District Court in the above case, as follows:

1. The District Court erred in confirming the report of the commissioner to whom said cause was referred to ascertain and report the amount of dam-

ages sustained by the merchandise involved herein, to wit, coffee, and in thereby holding and deciding that the value of said coffee upon its arrival at the port of San Francisco was only 5¼ cents a pound, and that said coffee was not worth, at said time and place, at least 6 cents a pound, which difference amounts at least to $579.03.

2. The District Court erred in not overruling said report of said commissioner, and in thereby holding and deciding that libelant was entitled to receive interest on the difference between 10½ cents a pound, as the sound value of said coffee, at the time of its arrival at said port of San Francisco, and 5¼ cents a pound, which is found by said commissioner as aforesaid to have been its value at said time and place, on 77,204 pounds, instead of allowing interest on the difference between said 10½ cents a pound and a sum not less than 6 cents a pound, upon a like quantity of coffee, which difference in interest amounts at least to $78.16.

3. The District Court erred in not overruling said report of said Commissioner to the extent of $657.19, at least, and in not reducing the amount of damages so found by him, by the said sum of $657.19, at least.

Dated, San Francisco, California, January 27, 1910.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant.

Service of the within Assignment of Errors, and receipt of a copy is hereby admitted this 27th day of January, 1910.

WILLIAM DENMAN,
Proctor for Libelant.

[Endorsed]: Filed Jan. 27, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

[Stipulation for Transmission of Original Exhibits to United States Circuit Court of Appeals.]

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY,

Libelant,

vs.

American Steamship "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interest Therein,

Respondents.

UNITED STEAMSHIP COMPANY (a Corporation),

Claimant.

It is hereby stipulated and agreed by and between the respective parties hereto that all the original exhibits in the above-entitled cause, used upon the reference before the United States Commissioner on the question of damages, may be transmitted by the clerk of the United States District Court to the Clerk of the United States Circuit Court of Appeals with the apostles on appeal in said cause.

Dated February 4, 1910.

WM. DENMAN,
Proctor for Libelant.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant.

[Endorsed]: Filed Feb. 4, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY,

Libelant,

vs.

American Steamship "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interest Therein,

Respondents.

UNITED STEAMSHIP COMPANY (a Corporation),

Claimant.

Stipulation and Order Extending Time to File Apostles on Appeal [to November 27, 1909].

It is hereby stipulated and agreed by and between the respective parties hereto, that United Steamship Company, claimant, and appellant herein, may have and it is hereby granted to and including the 27th day of November, 1909, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the apostles on appeal in the above-entitled cause.

Certified by the clerk of the United States District Court, Northern District of California.

Dated October 27, 1909.

WILLIAM DENMAN,
Proctor for Libelant and Appellee.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant and Appellant.

So ordered.

JOHN J. DE HAVEN,
Judge.

Oct. 27, 1909.

[Endorsed]: Filed Oct. 27, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY,
Libelant,

vs.

American Steamship "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interest Therein,
Respondents.

UNITED STEAMSHIP COMPANY (a Corporation),
Claimant.

Stipulation and Order Extending Time to File Apostles [to December 27, 1909].

Good cause appearing therefor, it is hereby ordered that United Steamship Company, a corpora-

tion, owner of the American Steamship "Santa Rita," claimant and appellant herein, may have and it is hereby granted thirty (30) days from and after November 27th, 1909, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit the apostles on appeal certified by the clerk of the United States District Court, for the Northern District of California (including assignment of error), in the above-entitled cause.

Dated November 26th, 1909.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Nov. 26, 1909. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY,
Libelant,

vs.

American Steamship "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interest Therein,
Respondents.

UNITED STEAMSHIP COMPANY (a Corporation),
Claimant.

Stipulation and Order Extending Time to File Apostles [to January 26, 1910].

Good cause appearing therefor, it is hereby ordered that United Steamship Company, a corporation, owner of the American steamship "Santa Rita," claimant and appellant herein, may have and it is hereby granted thirty (30) days from and after December 27th, 1909, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit the apostles on appeal certified by the clerk of the United States District Court for the Northern District of California (including assignment of errors), in the above-entitled cause.

Dated December 24th, 1909.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Dec. 24, 1909. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,642.

A. SCHILLING & COMPANY,
Libelant,

vs.

American Steamship "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interest Therein,
Respondents,

UNITED STEAMSHIP COMPANY (a Corporation),
Claimant.

Stipulation and Order Extending Time to File Apostles on Appeal [to February 5, 1910].

It is hereby stipulated and ordered by and between the respective parties hereto that United Steamship Company, a corporation, owner of the American steamship "Santa Rita," claimant and appellant herein, may have, and it is hereby granted to and including the 5th day of February, 1910, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit the apostles (including assignments of error), in the above-entitled cause, certified by the clerk of the United States District Court for the Northern District of California.

Dated January 26, 1910.

WILLIAM DENMAN,
Proctor for Libelant and Appellant.
PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant and Appellant.

The foregoing stipulation having been entered into, and good cause appearing therefor, it is hereby ordered that United Steamship Company, a Corporation, owner of the Steamship "Santa Rita," claimant and appellant herein, may have, and it is hereby granted, to and including the 5th day of February, 1910, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the apostle on appeal (including assignments of error), in the above-entitled cause, certified by

the clerk of the United States District Court, for the Northern District of California.

Dated January 27th, 1910.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jan. 27, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

Certificate of Clerk United States District Court to Apostles.

United States of America,
Northern District of California,—ss.

I, Jas. P. Brown, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the foregoing and hereunto annexed one hundred and one pages, numbered from 1 to 101, inclusive, with the accompanying exhibits, two in number, contain a full and true transcript of the records in the said District Court, made up pursuant to instructions, "Stipulation as to what Apostles shall contain" (embodied in the transcript) of Messrs. Page, McCutchen & Knight, proctors for claimants and appellant, in the case entitled A. Schilling and Company, etc. vs. The American Steamer "Santa Rita," etc., No. 13,642.

I further certify that the cost of preparing and certifying to the foregoing Transcript of Appeal is the sum of Fifty-two Dollars and Forty Cents, and that the same has been paid to me by proctors for claimant and appellants.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of February, A. D. 1910, and of the Independence of the United States the one hundred and thirty-fourth.

[Seal] JAS. P. BROWN,
Clerk.

[Endorsed]: No. 1822. United States Circuit Court of Appeals for the Ninth Circuit. The United Steamship Company (a Corporation), Claimant of the American Steamship "Santa Rita," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein, Appellants, vs. A. Schilling & Company (a Corporation), Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California.

Filed February 5, 1910.

F. D. MONCKTON,
Clerk.

Certificate of Clerk United States District Court to Exhibits.

United States of America,
Northern District of California,—ss.

I, Jas. P. Brown, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the annexed exhibit, Libelant's Exhibit No. 1 (Weight Voucher), and Respondent's Exhibit No. 1 (small bag of coffee, transmitted separately), are the original exhibits, introduced and filed by United States Commissioner Francis Krull, at the hearings before him, in the case of A. Schilling and Company, a Corporation vs. The American Steamer "Santa Rita," Her Tackle, Apparel, etc., No. 13,642, and are herewith transmitted to the Circuit Court of Appeals for the Ninth Circuit, as per stipulation filed in this court and embodied in the Transcript of Appeal herewith.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of February, A. D. 1910.

[Seal] JAS. P. BROWN,
Clerk.

[LIBELANT'S EXHIBIT No. 1.]

Wm H FORCE & CO.
CITY WEIGHERS
78 Front St
11th AVE & 26th ST.
271 SOUTH ST
24 & Old Slip
Roberts Stores
Martins Stores
Arbuckles Stores
Ind'p'd Stores
} New York
} Brooklyn

New York, Oct 15th 1906

Return of 500 Bags Coffee Weighed by order of Messrs. Arbuckle Bros. for A S C

Contain

14	21	48	14	21	76	14	21	60	14	21	96	
14	21	52	14	21	88	14	21	88	14	21	80	
14	21	52	14	21	84	14	22	00	14	21	36	
14	21	56	14	21	56	14	21	00	14	21	40	
14	21	52	14	21	68	14	21	48	12	18	24	
14	21	16	14	21	16	14	21	88	12	19	08	
14	21	52	14	21	52	14	21	60				
14	21	20	14	21	60	14	21	40				
14	21	72	14	21	60	14	22	20				
14	21	52	14	21	76	14	21	88				
140	21	472	140	21	636	140	21	712	80	12	384	

500 7720 + Lbs

Wm F Forces

Schellhaas
vs
Santa Rita
Libelant's Ex No 1.

No 13642
Schellhaas
vs
Santa Rita

UNITED STATES COMMISSIONER
NORTHN DIST OF CALIFORNIA

No. 1822
U S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
LIBELANTS EXHIBIT No. 1
Received FEB 5 1910.
F D MONCKTON. Clerk.

No. 1823

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs in Error.

vs.

LESTER W. DAVID,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

FILMER BROS. CO., PRINT, 330 JACKSON ST., S. F., CAL.

No. 1823

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs in Error.

vs.

LESTER W. DAVID,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

FILMER BROS. CO., PRINT, 330 JACKSON ST., S. F., CAL.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff and Defendant in Error,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants, and Plaintiffs in Error.

[Names and Addresses of] Counsel.

J. A. KERR, Esquire, Mutual Life Building, Seattle, Wash.,

E. S. McCORD, Esquire, Mutual Life Building, Seattle, Wash.,

Attorneys for Plaintiff and Defendant in Error.

CHARLES F. MUNDAY, Esquire, Starr-Boyd Building, Seattle, Wash.,

Attorney for Defendants and Plaintiffs in Error.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Amended and Supplemental Complaint.

Plaintiff complains and alleges:

I.

That on the 15th day of July, A. D. 1907, the plaintiff and defendants entered into a certain written contract in words and figures following, to wit:

"THIS MEMORANDUM OF AGREEMENT, made this 15th day of July, A. D. 1907, by and between Lester W. David, of the town of Anacortes, State of Washington, hereinafter known as the first party, and Edward F. Swift, of the City of Chicago, State of Illinois, Andrew D. Davidson, of the City of Toronto, Province of Ontario, Dominion of Canada, Alexander D. McRae, of the City of Winnipeg, Province of Manitoba, Dominion of Canada, and Peter Jansen, of the town of Jansen, State of Nebraska, hereinafter known as the second party, WITNESSETH:

That, whereas, the Fraser River Sawmills, Ltd., a corporation organized under the laws of the Province

of British Columbia, Dominion of Canada, and having its principal place of business located at Millside, British Columbia, has recently increased its capital stock from $500,000.00 to $1,000,000.00 in shares of the par value of $100.00 each; and

Whereas, the said increased stock amounting to $500,000.00 has not at this time been issued, but will be regularly issued prior to August 10th of this year; and,

Whereas, first party owns or controls more than 3,350 shares of the stock in said corporation, and will own or control upon the issuance of stock above referred to enough shares to more than equal a total of 6,700 shares; and,

Whereas, the said first party has this day agreed to sell to second party, and second party has agreed to buy of first party, a total number of 6,700 shares of the total stock of the Fraser River Sawmills, Ltd., corporation, at $75.00 per share to be paid for in the manner and in accordance with the terms hereinafter provided; and,

Whereas, first party agrees to deposit in escrow prior to August 10, 1907, in the Bank of Montreal of New Westminster, B. C., 6,700 shares of stock regularly issued and properly endorsed until payment as provided herein has been made therefor;

Now, therefore, in consideration of the sum of One Dollar ($1.00) in hand paid to first party by second party, the receipt of which is hereby acknowledged, and the accruing to the respective parties hereto of the mutual benefits hereunder:

It is agreed:

FIRST: Second party is to pay for the above 6,700 shares of stock in the following manner: $100,000.00 on or before August 10, 1907; $25,000.00 on August 15, 1907, and $25,000.00 on the first day and on the 15th day, respectively, of each and every month thereafter until the said number of shares is fully paid for at $75.0 per share, it being fully understood and agreed that as fast as and when payments are made there shall be released to second party by said Bank of Montreal the number of shares of stock so held in escrow of the Fraser River Sawmills, Ltd., corporation, figured at $75.00 per share as equals the amount of payment made.

An escrow agreement is executed by the parties hereto bearing this date and covering the deposit of 6,700 shares of stock, in the said Bank of Montreal and the manner of payment therefor.

SECOND: It is agreed that the first party will, prior to August 10, 1907, obtain in name of second party, or anyone second party may designate, and deliver to said second party a proxy for the 6,700 shares of stock herein referred to, which said proxy shall be satisfactory in form and substance to second party, and give all and every authority to vote said stock at any and all meetings of every kind, which may be necessary or needful in connection with the conducting the business of the Fraser River Sawmills, Ltd., corporation.

THIRD: First party is to give a satisfactory guarantee to second party that the quantity of timber on the different tracts of land as shown by the statement of the Fraser River Sawmills, Ltd., cor-

poration, under their statement of April 30, 1907, a copy of which is attached hereto and made a part hereof, is true and accurate, it being the intention and one of the conditions of this trade that the timber land at least run equal in quantity to the number of feet shown on the attached statement.

FOURTH: Second parties are to have until September 1, 1907, to cruise and verify the figures on the attached statement of April 30, 1907, regarding the quantity of timber on said various tracts, and in event of all of the tracts, from a cruising or other verification failing to reach the quantity represented in the attached statement, first party is to repay second party in just proportion that the amount of shortage bears to the value of the total number of feet of timber estimated to be on said tracts as appears in said attached statement bearing the date of April 30, 1907.

It is further agreed that in event second party fails to find the quantity of timber on said tracts represented by the statement of April 30, 1907, attached hereto, and said party fails to agree on a basis of settlement concerning such shortage, then and in that event an arbitration committee composed of three men, one named by each of the respective parties hereto and the two thus named agreeing on and naming a third, which arbitration committee will and shall have full power to settle the matter regarding shortage and whose action and decision in the matter shall be final.

In the event the two parties so named as the arbitration members fail for any reason to agree on

or name a third party within thirty days after their appointment on the committee, then and in that event the Judge of the District Court of New Westminster, District of British Columbia, shall name the third party and the decision by any two of said committee above referred to shall be considered and treated as the decision of the whole and accepted as final.

FIFTH: First party agrees that between the date of the execution of this instrument and the passing of title on August 10, 1907, to second party by the sale of stock herein referred to of the Fraser River Sawmills, Ltd., corporation, that he will not do or suffer to be done anything that will increase the general indebtedness of the Fraser River Sawmills, Ltd., corporation, or the Anacortes Lumber & Box Company, except it be for logs, material or labor necessary to keep the mills running in the ordinary manner, unless authorized by second party.

SIXTH: First party is to make diligent effort and procure if possible, the outstanding 280 shares of the capital stock of the Anacortes Lumber & Box Company not now owned by the Fraser River Sawmills, Ltd., corporation, said 280 shares of stock or any part thereof, of said Anacortes Lumber & Box Company which said first party may procure to be delivered to and paid for by the Fraser River Sawmills, Ltd., corporation, at a cost price of not more than $100.00 per share and as much less as the stock is actually purchased for.

SEVENTH: First party also agrees that he will have surrendered and canceled any and all contracts

with any individual, firm or company for the sale of the product of the Fraser River Sawmills, Ltd., corporation, or any contract of a similar nature which is binding on the Anacortes Lumber & Box Company, of which Company the said Fraser River Sawmills, Ltd., corporation, owns 720 shares, being the majority of the stock; except herefrom a present contract with Swift and Company.

EIGHTH: First party also agrees that should any contract or other obligation develop or be brought forward in the future for the purchase of any produce or other thing binding on the Fraser River Sawmills, Ltd., or the Anacortes Lumber & Box Company which said contract was not fully known and assented to by second party at the time either of making this agreement or at the time of taking over the control of the Fraser River Sawmills, Ltd., business or the Anacortes Lumber & Box Company business, then, and in that event said first party agrees to assume and treat said contract in every way as his own individual obligation, if called upon by the directors of the Fraser River Sawmills, Ltd., corporation, to do so.

NINTH: It is also agreed by the first party that he will not cause or permit to be increased except as herein provided the capital stock of the Fraser River Sawmills, Ltd., corporation, or any increase or any further issue of any stock of the Anacortes Lumber & Box Company, between the date of this agreement and the time of acquiring control by said second party of the Fraser River Sawmills, Ltd., corporation, and the Anacortes Lumber & Box Company.

TENTH: It is agreed that the first party is to be employed by the said Fraser River Sawmills, Ltd., corporation, at a salary of $6,500.00 per year for a period of at least 18 months from August 10, 1907, provided his services are satisfactory to said corporation, and said first party agrees to devote his entire time and attention and give his best efforts in the position in which he is employed, and he also agrees to dispose of within one year from this date any and all business interests which are not satisfactory to a majority of the directors of the Fraser River Sawmills, Ltd., corporation, provided, however, first party may hold stock in the Fraser Sawmills, Ltd., corporation.

It is further agreed that in event first party desires to sell his stock, second party agrees to purchase at any time on demand by the first party within 18 months from the date of this agreement all stock up to not exceeding 3,300 shares which may be owned or offered at the price of $75.00 per share, plus all net earning up to and not exceeding twenty per centum per annum which the stock may have earned from August 10, 1907, provided if said stock does not earn to exceed ten per centum net per annum first party waives any and all right or claim to the same.

It is further agreed that in event second party desires to purchase the stock owned or controlled by first party in the Fraser River Sawmills, Ltd., corporation, the same being not less than 2,000 shares of stock, and not to exceed 3,300 shares of stock, then said first party agrees to sell said stock at any time on demand by second party, within 18 months from

date hereof, at the price of $100.00 per share, plus all net earnings up to and not exceeding twenty per centum net per annum, which said stock may have earned from August 10, 1907, provided if said stock does not earn to exceed ten per cent net per annum, first party waives any and all right or claim to the same.

ELEVENTH: It is agreed and understood that the term "net earnings" as herein used contemplates the general income from the operations of the Fraser River Sawmills, Ltd., corporation, after making all deductions for general operations, maintenance, repairs and a usual amount for depreciation of the plant and equipment.

TWELFTH: It is further agreed that this agreement is to be binding upon the respective parties hereto, their heirs, executors and administrators and assigns.

THIRTEENTH: It is the expectation of the Fraser River Sawmills, Ltd., corporation, to proceed after August 10, 1907, with certain improvements to bring the plants of the Fraser River Sawmills, Ltd., corporation, and the Anacortes Lumber & Box Company up to as near a practicable working standard as possible, with a view of getting the largest output of product, to log their own timber, provide the necessary logging camps, tugs, etc.

Witness our hands and seals the day and year first above written.

LESTER W. DAVID. [Seal]
EDWARD F. SWIFT. [Seal]
A. D. McRAE. [Seal]
A. D. McRAE. [Seal]
for
A. H. DAVIDSON. [Seal]
PETER JANSEN. [Seal]

FRASER RIVER SAWMILLS, LTD.

MILLSIDE, B. C., APR. 30, 1907.

ASSETS:

1. TOWNSITE OF MILLSIDE:			
96 Lots 66 ft. x 132 ft. in Lot No. 48 at $200.00		$19,200.00	
17 Dwellings		13,604.33	
147.22 Acres in Lot No. 48, Cleared at $400.00		58,888.00	$91,692.33
2. SUBURBAN ACREAGE:			
95.05 Acres, Lot No. 46 on Pitt River Road at $200			19,010.00
3. MILL & MANUFACTURING SITES:			
112.47 Acres, in Lots 16, 17 and 18, with 3500 feet of deep water frontage at $500.00			56,235.00
4. REAL ESTATE:			
1793 Acres in Sayward District at $5			8,965.00
5. PLANT:			
Boiler-House Buildings	$ 9,526.73		
Contents	22,609.51		
Water-tank	532.52	$ 32,668.76	
Sawmill Building	42,991.60		
Contents	119,095.93		
Log Haul	1,445.16	$163,532.69	
Lath Building	768.31		
Machinery, etc.	4,442.94	5,211.25	
Roller Band Resaw Bldg.	1,303.88		
Machinery, etc.	4,225.63	5,529.51	
Filing-Room Bldg.	736.00		
Machinery, fix.	3,187.73	3,923.73	
Drag-Saw Building	174.07		
Machinery, etc.	843.50	1,017.57	
Deck Planers Bldg.	402.17		
Machinery, etc.	6,092.92	6,495.09	
Machine-Shop Bldg.	982.37		
Contents	6,735.02	7,717.39	
Carpenter-Shop Bldg.	317.08		
Contents	213.22	530.30	
			$175,902.33

			$175,902.33
PLANT, Con't.			
Storeroom Building	$ 473.10		
Contents	221.15	$ 694.25	
Office Building	292.17		
Contents	1,190.30	1,482.47	
Stables Building	2,130.54		
Tools, etc.	513.10	2,643.64	
Cow Barn Building	929.07		
Tools, etc.	733.00	1,662.07	
Boarding-House Bldg.	2,544.49		
Contents	1,939.00	4,483.49	
Bunk-House and Lndry. Bldg.	713.85		
Contents	1,242.29	1,956.14	
Bunk-House No. 2 Bldg.	275.63		
Contents	239.60	515.23	
Wharf. Platforms, etc.		23,311.67	
Refuse Burner		21,134.97	
Boom Piling	4,185.31		
Sticks, Tools	1,940.30	6,125.61	
Electric Light Plant			
Machinery	3,958.33		
Outside Lights, Transformers, etc	953.94	4,912.27	
Sorting Table and Overpass			
Planing-Mill Bldg.	6,672.98		
Steam Piping	1,304.20		
Machinery	26,380.41		
Blow Pipe	2,850.00	37,207.59	
Dry Kiln Bldg.	10,852.16		
Truck, Pipe, etc.	7,230.10	18,082.26	
Oil-House		117.24	
Dry Lumber Shed Bldg.	3,944.95		
Fixtures	133.00	4,077.95	
Land Pile-Driver		2,850.00	
WaterWorks, Piping Main Line		802.15	373,598.15
			$549,500.48

		$549,500.48
6. IMPROVEMENTS:		
Sawmill	$ 3,791.73	
Wharf	1,314.00	
Electric Light Plant	171.66	
Boarding-House	45.26	
Office	198.40	
C. P. R. Switch	6.00	
Land Pile-Driver	23.58	
Townsite	1,791.71	
Planing-Mill	697.36	
Dry Kiln	26.78	
Boom	144.62	
Dry Lumber Shed	1,836.20	
Lath-Mill	56.03	10,103.33
7. TIMBER LANDS:		
50 Provincial Licenses 32000 Acres, containing 500,000,000 ft. at 50¢	$250,000.00	
60,000,000 ft. of Crown Granted Timber carrying no Royalty	58,763.23	
141,925 ft. Timber, Crown Granted Land, Comox Dist. & Denman Island at $1	141,925.00	
170,000,000 ft. timber Government Leases at 50¢	85,000.00	
E. & N. Ry. Co. Timber 5475 Acres, 164,250,000 ft. at $1	164,250.00	699,938.23
8. STOCK:		
Logs	46,254.68	
Rough Lumber	136,971.21	
Dressed Lumber	42,810.60	
Siding Account	741.30	
Lath	1,902.28	228,680.07
9. ANACORTES LUMBER & BOX CO.		
Stock	72,250.00	
Surplus	27,750.00	100,000.00
10. GREAT NORTHERN LUMBER CO.		
Stock		5,645.00
11. SUNDRY & INVENTORIES.		
Tools & Supplies	20,267.32	
Horses, Cows, etc.	22,089.10	

Oil	$ 61.05	
Camp Investments	23,724.80	46,142.27
12. CANADIAN PACIFIC R. R. CO.		
Switch		1,618.20
13. CAMPS: Plant Accts.		
Camp No. 1	17,860.22	
2	4,250.00	
3	2,850.00	24,960.22
		1,666,587.80
14. Cash revolving fund		15.79
15. Sundry Stockholders		11,866.67
16. Bank of Montreal Timber Acct.		11,750.00
17. American National Bank		500.00
18. Anacortes Lumber & Box Co.		1,563.56
19. E. & N. Ry. Co., Timber Cruising Acct.		2,232.56
20. Timber Cruising Acct.		7,677.40
21. Unexpired Insurance		13,323.61
22. Employer's Liability Insurance		431.99
23. Boarding-house		772.98
24. Discount and Commission		2,595.30
25. Interest and Exchange		5,804.43
26. Camp Pay-roll		218.18
27. Bills Receivable		23,834.00
28. Accounts Receivable		73,934.88
		$1,823,009.15

LIABILITIES:

1.	Stock		$ 500,000.00
2.	Accounts Payable		108,356.89
3.	Bills Payable		228,874.61
4.	Timber Bills Payable		139,852.35
5.	Bills of Lading Payable		5,760.00
6.	Employees		11,092.33
7.	Sundry Stockholders		3,594.44
8.	E. J. Dodge Company		24,740.29
9.	Sundry Gain Accounts:		
	Stable	$ 128.59	
	Dairy	47.55	
	Over and Under Weights	121.71	
	Wood	342.16	
	Sundry Earnings	724.41	1,364.42
10.	Government Stumpage		6,102.04
11.	Surplus Account		743,644.08
12.	Cash Balance		49,627.70
			1,823,009.15

II.

That on the 5th day of January, A. D. 1908, the plaintiff and the defendants entered into a certain written agreement modifying in part the terms and provisions of said contract of July 15, 1907, which said modified contract is in words and figures following, to wit:

"Memorandum of agreement made this 8th day of February, A. D. 1908, by and between Lester W.

David of the town of Anacortes, State of Washington, hereinafter known as the first party, and Edward F. Swift, of the city of Chicago, State of Illinois, Alexander D. McRae, of the City of Winnipeg, Province of Manitoba, Dominion of Canada, Andrew D. Davidson, of the City of Toronto, Province of Ontario, Dominion of Canada, and Peter Jansen of the town of Jansen, State of Nebraska, hereinafter known as the second party:

That whereas, under a certain agreement made the 15th day of July, 1907, by and between above parties, certain times of payment *was* provded for, and whereas it is now desired to change the fourth clause relative thereto; now therefore, in consideration of the sum of $1.00 in hand paid to the first party by the second party, the receipt of which is hereby acknowledged, and the accruing to the respective parties hereto of the mutual benefits hereunder.

It is agreed: That the payment due March 15, 1908, $25,000; April 1, 1908, $25,000; April 15, 1908, $2,500.00, shall be extended as follows: September 1, 1908, $25,000.00; October 1, 1908, $27,500.00 with interest from date hereof at the rate of 6½% per annum.

It is further agreed that four notes of second party shall be given first party, dated February 1, 1908, each calling for $25,000.00 and due July 1, 1908, July 15, 1908, August 1, 1908, and August 15, 1908, respectively, at Bank of Montreal, New Westminster, B. C., with interest thereon at the rate of seven per cent. per annum from date.

It is further agreed that 1333 number of shares of

stock of the Fraser River Sawmills, Ltd., corporation, is to be delivered second party and attached to above notes as collateral.

It is further agreed that the time for cruising as referred to in the fourth clause of the contract dated July 15, 1907, shall be extended and it is further agreed that that part of clause ten of said contract which refers to the employment of first party is hereby abrogated.

It is further agreed that the other clauses in said contract of July 15, 1907, not inconsistent herewith shall remain in full force and effect.

Witness our hands and seals the day and year first above written.

LESTER W. DAVID.

ALEXANDER McRAE.
EDWARD F. SWIFT.
A. D. DAVIDSON.
PETER JANSEN."

III.

That under the terms and provisions of said contract of July 15, 1907, the sum of $25,000.00 became due and payable on March 1, 1908, that the plaintiff has demanded the payment of said sum, but that defendants have not paid the same nor any part thereof and the whole sum of $25,000.00 maturing under the terms of said contract on March 1, 1908, is now due and unpaid with interest at the rate of six per cent per annum from the first day of March, 1908.

IV.

That under the provisions of said contract of July 15, 1907, $25,000.00 became due on the 15th day of

March, 1908, and $25,000 became due on the 1st day of April, 1908, and $2,500 became due on April 15, 1908. That by the terms of the contract of February 8, 1908, said payments were extended as follows: The payment due on March 15, 1908, of $25,000.00 was extended to September 1, 1908; and the payments due on April 1, 1908, and April 15, 1908, were extended to October 1, 1908, making a sum of $27,000.00 due on October 1, 1908; and making a sum of $25,000.00 due and payable on September 1, 1908; that the plaintiff has demanded the payment of said sum of $25,000.00 due under the terms of said last named contract on September 1, 1908, that the defendants have not paid the same nor any part thereof and the whole sum of $25,000.00 with interest at the rate of 6½% per annum from the 8th day of February, A. D. 1908, is now due and unpaid. That the said sum of $27,500.00 due on October 1, 1908, as provided in said contract of February 8, 1908, is now due and unpaid and that the plaintiff has demanded the payment of the same from the defendants, but that the defendants have not paid the same nor any part thereof and the whole sum is due and unpaid.

V.

That the plaintiff has duly performed all of the provisions and conditions in said contract required under the terms thereof to be performed by him.

VI.

That as a part of the consideration for the execution of the contract of February 8, 1908, the defendant agreed to pay upon said contract the sum of $50,000.00 as of February 1, 1908; that the said sum

of $50,000.00 was paid on March 7, 1908, but no interest was paid thereon for the intervening time between February 1, 1908, and March 7, 1908, that the plaintiff was entitled to interest thereon at the rate of seven per cent per annum from February 1, 1908, to March 7, 1908.

Wherefore, plaintiff prays for judgment against the defendants and each of them for the sum of $25,000.00 with interest thereon at the rate of 6% from the 1st day of March, 1908, and for the additional sum of $25,000.00 at the rate of 6½% per annum from the 8th day of February, A. D. 1908, and for an additional sum of $27,500.00, with interest at the rate of 6½% per annum from the 8th day of February, 1908, and for judgment for interest at the rate of 7 % per annum on $50,000.00 from February 8, 1908, to March 7, 1908, and for his costs and disbursements in this action expended.

KERR & McCORD,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

E. S. McCord, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff above named; that he has read the foregoing amended and supplemental complaint and knows the contents thereof and believes the same to be true; that the plaintiff is now absent from the State of Washington and that affiant makes this verification for and on behalf of the plaintiff and because of the absence of the plaintiff from the State of Washington.

E. McCORD.

Subscribed and sworn to before me this 31st day of December, A. D. 1908.

CHAS. F. MUNDAY,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within Amended Complaint received and due service of same acknowledged this 31st day of December, 1908.

CHAS. F. MUNDAY,
Attorney for Defendant.

[Endorsed]: Amended and Supplemental Complaint. Filed U. S. Circuit Court, Western District of Washington. Jan. 23, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Amended Answer.

Comes now the defendants and for amended answer to the amended and supplemental complaint of the plaintiff herein

I.

Admit that on July 15, 1907, the plaintiff and the defendants entered into a certain written contract in substance as the same is set out in the first paragraph of said complaint.

II.

Admit that on the 8th day of February, 1908, the plaintiff and the defendants entered into a certain other written agreement modifying in part the terms and provisions of said contract of July 15, 1907, which said certain other written agreement was in substance as is alleged and set out in the second paragraph of said complaint.

III.

Admits that the plaintiff has demanded payment as alleged in the third paragraph of said complaint, and admits that the defendants have not paid the sum therein alleged to have been demanded, or any part thereof, but deny each and every allegation contained in said third paragraph of said complaint.

IV.

Admit that the times for the maturing of certain of the payments provided by said contract of July 15, 1907, to be made, were by the terms of the contract, dated February 8, 1908, extended as alleged in the fourth paragraph of the complaint, and admit that the plaintiff has made demand for payment of the several sums, as alleged in the fourth paragraph of the complaint, and admit that no part of said several sums has been paid, but deny each and every other allegation contained in the fourth paragraph of said complaint.

V.

Deny each and every allegation contained in the fifth paragraph of said complaint.

VI.

Admit that as part of the consideration for the execution of the contract of February 8, 1908, the defendants agreed to pay the sum of Fifty Thousand Dollars as of February 1, 1908, but deny each and every other allegation contained in the sixth paragraph of said complaint.

And by way of a first affirmative partial defense to so much of the claim of the plaintiff as is alleged in the sixth paragraph of the complaint these defendants allege:

I.

That these defendants in compliance with their agreement to pay the plaintiff the sum of Fifty Thousand Dollars, bearing date February 1, 1908, and bearing interest from that date, which notes were received and accepted by the plaintiff as full payment and full compliance with the agreement of the defendants to make such payment, and which notes the plaintiff subsequently sold and received the proceeds thereof, and which notes were at maturity, together with the interest then due thereon, fully paid by these defendants.

And by way of a second further separate and affirmative defense and set off, these defendants allege:

I.

That under and by the terms of the contract of July 15, 1907, made and entered into between the

plaintiff and the defendants as alleged and set out in the first paragraph of the complaint, the said plaintiff guaranteed to the defendants that there was upon the different tracts of land referred to and described in the statement, a copy of which was attached to said contract, the quantity of timber shown by said statement; that it was well understood between the plaintiff and the defendants that the value of the stock of the Fraser River Sawmills, Limited, which formed the subject matter of the said agreement of July 15, 1907, depended largely upon there being upon said timber lands the quantity of timber so represented and guaranteed by the plaintiff; that in and by said agreement it was guaranteed that upon certain timber lands covered by fifty certain provincial licenses and aggregating thirty-two thousand acres there were five hundred million feet of timber, and upon certain timber lands represented by crown grants of the timber carrying no royalty there were sixty million feet of timber; and upon certain timber lands covered by crown grants in the Comox District, and Denman Island, there were 141,925 feet of timber, and upon certain timber land covered by Government leases there were one hundred and seventy million feet of timber, and upon certain timber lands known and designated as the E. & N. Ry. Co., timber aggregating five thousand four hundred and seventy (5,470) acres there were 164,250,000 feet of timber, all of the aggregate value of $699,983.23.

II.

That in truth and in fact the timber land described

and referred to in said agreement did not contain at that time, and does not now contain the quantity of timber in the aggregate, or on the said several tracts as so guaranteed by the plaintiff, and upon a cruising and verification made by the said defendants within the time provided in said agreement and the modifications thereof, it was ascertained by the defendants that the quantity of timber on said various tracts failed to reach the quantity represented in the statement attached to said agreement of July 15, 1907, and the defendants failed to find the quantity of timber on said tracts represented by said statement, and said agreement, but ascertained and found that as a matter of fact said timber lands contained a much less quantity of timber than was so represented and guaranteed by the plaintiff, and that the quantity of timber upon said various tracts was and is at the various prices as guaranteed in said agreement of July 15, 1907, of the actual value of Two Hundred Forty-four Thousand Two Hundred and Ninety-one and 79/100 ($244,291.79) Dollars, less than was so represented and guaranteed by the plaintiff, and that the just proportion that the amount of shortage bore and bears to the total number of feet of timber estimated and guaranteed by the plaintiff to be on said tracts a shown by said agreement and the statement attached thereto was and is Two Hundred Forty-four Thousand Two Hundred Ninety-one and 79/100 Dollars ($244,291.79), whereby the said plaintiff became and ever since has remained and is now obligated under the terms of said agreement to repay to the defendants the said

sum of Two Hundred Forty-four Thousand Two Hundred Ninety-one and 79/100 Dollars ($244,-291.79), which amount is in excess of any and all sums yet remaining unpaid to the plaintiff by the defendants under the terms of the several agreements set out in the complaint.

And by way of a third separate and affirmative defense these defendants allege:

I.

The defendants here refer to and repeat and make a part of this affirmative defense each and every allegation contained in the first affirmative defense and setoff above pleaded.

II.

That in and by the said agreement set out in the first paragraph of the complaint and dated July 15, 1907, it was agreed as follows: "It is further agreed that in event second party (to wit, these defendants) fails to find the quantity of timber on said tracts represented by the statement of April 30, 1907, attached hereto, and said party fails to agree on a basis of settlement concerning such shortage, then and in that event, an arbitration committee, composed of three men, one named by each of the respective parties hereto, and the two thus named agreeing on and naming the third, which arbitration committee will and shall have full power to settle the matter regarding shortage, and whose action and decision in the matter shall be final.

III.

That upon these defendants having ascertained and determined from a cruising and other verifica-

tion that the quantity of timber on said various tracts failed to reach the quantity represented and guaranteed by the plaintiff by the terms of said agreement these defendants notified the plaintiff of such fact and requested that said timber should be recruised by three cruisers under and according to the provisions of said agreement herein set out; that the plaintiff after being so notified, and after having a reasonable time to do so, failed and refused to appoint or name an arbitrator or cruiser on his part, and never at any time before or since the bringing of this action offered to arbitrate the matter regarding such shortage of timber, or demanded such arbitration, but at all times failed and refused to carry out or perform the terms of said agreement with reference to such arbitration, and at no time prior to the commencement of this action, or since, would the plaintiff appoint or name an arbitrator or cruiser on his part to act with an arbitrator or cruiser appointed and named by these defendants, as an arbitration committee under the terms of said agreement of July 15, 1907; that these defendants were at all times prior to and up to the time of the commencement of this action ready and willing and offered to appoint and name an arbitrator or cruiser to act as one of the arbitration committee provided by said agreement to be appointed to settle the matter regarding such shortage of timber.

And by way of a fourth further separate and affirmative defense and counterclaim, these defendants allege:

I.

That under and by the terms of the contract of July 15, 1907, made and entered into between the plaintiff and the defendants as alleged and set out in the first paragraph of the complaint, the said plaintiff guaranteed to the defendants that there was upon the different tracts of land referred to and described in the statement, a copy of which was attached to said contract, the quantity of timber shown by said statement; that it was well understood between the plaintiff and the defendants that the value of the stock of Fraser River Sawmills, Limited, which formed the subject matter of the said agreement of July 15, 1907, depended largely upon there being upon said timber lands the quantity of timber so represented and guaranteed by the plaintiff; that in and by said agreement it was guaranteed that upon certain timber lands covered by fifty certain provincial licenses and aggregating thirty-two thousand acres there were five hundred million feet of timber, and upon certain timber lands represented by crown grants of the timber carrying no royalty there were sixty million feet of timber; and upon certain timber lands covered by crown grants in the Comox District and Denman Island, there were 141,925 feet of timber, and upon certain timber land covered by Government leases there were one hundred and seventy million feet of timber, and upon certain timber lands known and designated as the E. & N. Ry. Co., timber aggregating five thousand four hundred and seventy (5,470) acres, there were

164,250,000 feet of timber, all of the aggregate value of $699,983.23.

II.

That in truth and in fact the timber land described and referred to in said agreement did not contain at that time and does not now contain the quantity of timber in the aggregate, or on the said several tracts as so guaranteed by the plaintiff, and upon a cruising and verification made by the said defendants within the time provided in said agreement and the modifications thereof, it was ascertained by the defendants that the quantity of timber on said various tracts failed to reach the quantity represented in the statement attached to said agreement of July 15, 1907, and the defendants failed to find the quantity of timber on said tracts represented by said statement, and said agreement, but ascertained and found that as a matter of fact said timber lands contained a much less quantity of timber than was so represented and guaranteed by the plaintiff, and that the quantity of timber upon said various tracts was and is at the various prices as guaranteed in said agreement of July 15, 1907, of the actual value of Two Hundred Forty-four Thousand Two Hundred Ninety-one and 79/100 Dollars ($244,291.79), less than was so represented and guaranteed by the plaintiff, and that the just proportion that the amount of shortage bore and bears to the total number of feet of timber estimated and guaranteed by the plaintiff to be on said tracts as shown by said agreement, and the statement attached thereto was and is Two Hundred Forty-four Thousand Two Hundred

Ninety-one and 79/100 Dollars ($244,291.79), whereby the said plaintiff became and ever since has remained and is now obligated under the terms of said agreement to repay to the defendants the said sum of Two Hundred Forty-four Thousand Two Hundred Ninety-one and 79/100 Dollars ($244,-291.79), and said plaintiff thereby became and ever since has remained and is now indebted to these defendants in said sum of Two Hundred Forty-four Thousand Two Hundred Ninety-one and 79/100 Dollars.

Wherefore, these defendants demand judgment:

1. That plaintiff take nothing by his complaint herein.

2. That the defendants have and recover of and from the plaintiff the sum of Two Hundred Forty-four Thousand Two Hundred Ninety-one and 79/100 Dollars, together with interest thereon, and together with their costs.

3. That the defendants have and recover judgment against the plaintiff for their costs and disbursements in this action.

CHAS. F. MUNDAY,
Attorney for Defendants.

United States of America,
Western District of Washington,—ss.

Chas. F. Munday, being first duly sworn, on oath says: I am the attorney for the defendants in the above-entitled action, and make this verification on their behalf for the reason that none of said defendants are now within the Western District of Wash-

ington. I know the contents of the foregoing amended answer and counterclaim and believe the same to be true.

[Seal] CHAS. F. MUNDAY.

Subscribed and sworn to before me, this 5th day of April, 1909.

CLIFFORD J. ANDRUSS,
Notary Public.

Service by copy admitted this 5th day of April, 1909.

KERR & McCORD,
Attorneys for Plaintiff.

[Endorsed]: Amended Answer. Filed U. S. Circuit Court, Western District of Washington. May 10, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT et al.,

Defendants.

Amended Reply.

Comes now the plaintiff above named and replying to the first affirmative defense contained in the answer of the defendants herein for cause of reply, alleges:

I.

Plaintiff denies that the $50,000 referred to in the first affirmative defense has been paid in full; admits that the principal sum of $50,000 has been paid but denies that the interest on the same from the 8th day of February, 1908, to the 7th of March, 1908, or any part thereof has been paid.

Replying to the second affirmative defense set up by the defendants in their answer, the plaintiff alleges:

He denies the allegations contained in paragraph one of said affirmative defense and each and every part thereof.

II.

Replying to the second paragraph of the second affirmative defense, this plaintiff denies the same and each and every part thereof, and denies particularly that the plaintiff became obligated under the terms of the agreement referred to in said paragraph to repay to the defendants or either of them, the sum of $244,291.79 or in any other sum whatsoever, and denies that the plaintiff is indebted to the defendants in any sum or sums whatsoever.

Replying to the third affirmative defense set up by the defendants in their answer, plaintiff alleges:

I.

He denies the allegations contained in paragraph one of said affirmative defense and each and every part thereof.

II.

Plaintiff admits that the contract of July 16, 1907, set forth in the complaint, contains the following language:

"It is further agreed that in event second party fails to find the quantity of timber on said tracts represented by the statement of April 30, 1907, attached hereto, and said party fails to agree on a basis of settlement concerning such shortage, then and in that event an arbitration committee composed of three men, one named by each of the respective parties hereto and the two thus named agreeing on and naming a third, which arbitration committee will and shall have full power to settle the matter regarding shortage and whose action and decision in the matter shall be final."

III.

Replying to the third paragraph of the third affirmative defense, plaintiff denies the same and each and every part thereof.

Replying to the fourth affirmative defense set up by the defendants in their answer, plaintiff alleges:

I.

He admits the execution of the contract referred to in the first paragraph of said fourth affirmative defense, dated July 15, 1907, and denies each and every other allegation in said paragraph contained and each and every part thereof.

II.

Replying to the second paragraph of said fourth affirmative defense, the plaintiff denies each and every allegation therein contained and each and every part thereof and denies that the plaintiff became, was or is obligated to repay to the defendants the sum of $244,291.79 or any other sum whatsoever, and denies that the plaintiff is indebted to the defendants

in the sum of $244,291.79 or in any other sum whatsoever.

Further replying to the third affirmative defense of the defendants and by way of affirmative reply thereto, this plaintiff alleges:

That the defendants never ascertained or determined by cruising or other means of verification that the quantity of timber on said various tracts of land referred to in the answer failed to reach the quantity represented and guaranteed by the plaintiff by the terms of said agreement of July 15, 1907, and alleges that the defendants notified the plaintiff that they had found that the quantity of timber did aggregate the quantity specified and guaranteed in said contract; that the defendants never at any time failed to find the quantity of timber specified on said tracts and alleges that there was no shortage in the quantity of timber on said tracts, and alleges that the defendants did find the quantity of timber on said tracts of land as described in the contract of July 15, 1907, in accordance with the terms and provisions of said contract, and that the defendants represented that they found there was no shortage whatever in the quantity of timber mentioned in said contract. That the quantity of timber on said tracts of land greatly exceeds the quantity represented by plaintiff in said contract of July 15, 1907. That never at any time until long after the commencement of this suit did the defendants nor any of them request the plaintiff to recruise the timber upon the lands in question. That never at any time did the defendants advise the plaintiff of any shortage upon any tract

or tracts of the lands described in the complaint, until after the commencement of this action. That by reason of the action of said defendants the defendants are estopped from asserting or claiming any arbitration under the provisions of the said contract.

Wherefore, plaintiff prays judgment in accordance with the prayer of his complaint.

KERR & McCORD,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

E. S. McCord, being first duly sworn, deposes and says: That he is one of the attorneys for plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true; that he wishes this verification because of the absence of plaintiff from the State of Washington and as attorney of plaintiff.

Subscribed and sworn to before me this the 27th day of September, A. D. 1909.

CHAS. F. MUNDAY,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within reply received and due service of same acknowledged this 27th day of September, 1909.

CHAS. F. MUNDAY,
Attorney for Defendants.

[Endorsed]: Reply. Filed U. S. Circuit Court, Western District of Washington. Sept. 27, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Motion to Strike Certain Portions of the Amended Reply.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT et al.,

Defendants.

Come now the defendants and move the Court to strike from the affirmative reply contained in the amended reply of plaintiff herein the following portions thereof, because the same are not affirmative matters, and do not constitute an affirmative reply, and amount to no more than denials, to wit:

I.

All that part thereof from and including the word "That" in line 13 of page three of said amended reply down to and including the figures "1907" in line 18 of said page three.

II.

All that part from and including the word "that" in line 21, page three, of said reply down to and including the word "contract" in line 27 of page three.

III.

From and including the word "that" in line 29, page three, down to and including the figures "1907" at the end of line 31, page three.

And defendants further move the Court to strike from said affirmative reply all of the remaining portion thereof on the ground that the same is purely evidentiary matter, which could be given in evidence under the denials contained in said reply, and does not constitute an affirmative reply.

CHAS. F. MUNDAY,
Attorney for Defendants.

Service by copy admitted this 30th day of September, 1909.

KERR & McCORD,
Attorneys for Plaintiff.

[Endorsed]: Motion to Strike. Filed U. S. Circuit Court, Western District of Washington. Oct. 1, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Complainant,

vs.

EDWARD F. SWIFT et al.,

Defendants.

Order [Granting Motion to Strike Certain Portions of the Reply, Without Prejudice, etc.].

This cause coming on to be heard this 11th day of October, A. D. 1909, upon the motion of the defend-

ants to strike certain affirmative matter from the reply of the complainant, and after due consideration of the same by the Court, it appears that the same should be granted.

Wherefore, it is by the Court ordered, that said motion be and the same is hereby granted without prejudice to the rights of the complainant to offer evidence in support of the allegations contained in the affirmative matter set forth in the reply, provided such evidence be material.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed U. S. Circuit Court, Western District of Washington. Oct. 16, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy

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[Motion to File a Supplemental Answer.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE, and PETER JANSEN,

Defendants.

Come now the defendants and on the affidavit hereto annexed, move the Court for an order allowing

and permitting the said defendants to file the supplemental answer herein herewith tendered.

CHAS. F. MUNDAY,
Attorney for Defendants.

[Affidavit on Motion to File a Supplemental Answer, etc.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE, and PETER JANSEN,

Defendants.

State of Washington,
County of King,—ss.

Chas. F. Munday, being first duly sworn, on oath says: I am attorney for the defendants in the above-entitled action. The facts stated in the supplemental answer herewith tendered are true, as affiant is informed and verily believes; that affiant in the affidavit in support of a motion for continuance made on the 9th day of December, 1909, and filed in this court on the 10th day of December, 1909, in referring to the judgment rendered by the Supreme Court of British Columbia, stated that the defendants in this action,

plaintiffs in the action in the Supreme Court of British Columbia, has appealed to the Circuit Court of Appeals in British Columbia from said judgment; that affiant had been advised and informed that an appeal had been taken, but had not been fully informed that said appeal was only from so much of said judgment as dismissed the complaint of the plaintiffs in said action, said complaint being for the same cause of action as is pleaded by the defendants in this action in their counterclaim herein, and that said appeal was not an appeal from the judgment rendered by said Supreme Court of British Columbia on the counterclaim of said Lester W. David, in that action, said counterclaim being for the same cause of action sued upon by the said Lester W. David in his complaint in this action, the said judgment so rendered in favor of said David by the Supreme Court of British Columbia being in no wise affected by said appeal; that attached hereto is a copy of said judgment as so given, rendered and entered by the Supreme Court of British Columbia, and also a copy of the only notice of appeal given in said action in said court.

CHAS. F. MUNDAY.

Subscribed and sworn to before me this 17th day of December, A. D. 1909.

[Seal] CLIFFORD J. ANDRUSS,
Notary Public in and for the State of Washington,
Residing at Seattle.

In the Supreme Court of British Columbia.

BETWEEN

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs,

and

LESTER W. DAVID.

Before the Honorable Mr. JUSTICE MORRISON.

Saturday, the 4th day of December, 1909.

This action coming on for trial on the 3d day of December, 1909, before this Court at the city of Vancouver, B. C., in the presence of Mr. E. P. Davis, K. C. and Mr. J. W. Pugh, of counsel for the plaintiffs, and Mr. E. V. Bodwell, K. C. and Mr. R. L. Reid, K. C. of counsel for the defendant, upon having read the pleadings and what was alleged by counsel aforesaid this Court was pleased to direct this action to stand over for judgment and the same coming on this day for judgment;

This Court doth order and adjudge that this action be and the same is hereby dismissed with costs to be paid by the plaintiffs to the defendant forthwith after taxation hereof;

And this Court doth further order and adjudge that the defendant do recover against the plaintiff on his counterclaim the sum of $77,500.00 with interest on $25,000.00 thereof at five per cent per annum from the 1st day of March, 1908, to judgment and with interest on $52,500.00 from the 8th day of

February, 1908, until judgment at the rate of six and one-half per cent per annum, together with costs to be paid by the plaintiff to the defendant forthwith after taxation. Item "D" of the counterclaim for interest on $50,000.00 at the rate of seven per cent per annum from the 8th day of February, 1908, to the 7th day of March, 1908, is to stand over for decision by this Court at a later date on application of the defendant herein. Execution on the counterclaim to be stayed for ten days and afterwards pending appeal if the plaintiffs do within the said space of ten days, or such further time as may be allowed by the Court or a Judge, give notice of appeal herein to the next sitting of the Court of Appeal and also give security to the satisfaction of the Registrar for the payment of the amount for which judgment is given on the counterclaim herein.

By the Court

"A. B. POTTENGER,"

District Registrar.

Entered Vol. 4, p. 435, 7th Decr. 1909.

"R. A. E."

In the Supreme Court of British Columbia.

BETWEEN

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs,
(Appellants),

and

LESTER W. DAVID,

Defendant,
(Respondent).

NOTICE OF APPEAL.

Take notice that the above-named plaintiffs hereby appeal to the Court of Appeal from the judgment of the Honorable Mr. Justice Morrison pronounced herein on the 4th day of December, 1909, dismissing the plaintiff's action.

And take notice that the said Court of Appeal will be moved at the law courts, Bastion Square, Victoria, on Tuesday, the 4th day of January, 1909, at the hour of eleven o'clock in the forenoon, or as soon thereafter as the Court may sit and counsel can be heard by counsel on behalf of the above-named plaintiffs for an order setting aside the judgment and granting a new trial on the following among other grounds:

1. That the said judgment is contrary to law.

2. That the covenant for arbitration in the agreement in question in the said action did not constitute a condition precedent to the plaintiff's right to bring an action for shortage in the quantity of timber referred to in the said agreement.

3. That the covenant to repay and the covenant to refer in the said agreement are independent and collateral covenants.

Dated the 6th day of December, 1909.

D. G. MARSHALL,
Solicitor for the Plaintiffs.

To D. S. WALLBRIDGE,
Solicitor for the Defendant.

Service by copy admitted this 17th day of December, 1909.

KERR & McCORD,
Attorneys for Plaintiff.

[Endorsed]: Motion and Affidavit. Filed U. S. Circuit Court, Western District of Washington. December 17, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Order Denying Motion to File a Supplemental Answer, with Leave to Renew the Motion.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT et al.,

Defendants.

December 20, 1909.

Now, on this day this cause comes on for hearing upon motion of defendants for order to file supple-

mental answer; the Court after hearing argument of respective counsel and being sufficiently advised denies said motion, granting leave to renew said motion on Thursday, December 23d, at ten P. M.

Entry in General Order Book No. 2, page 425, United States Circuit Court.

[Proceedings had December 23, 1909.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Be it remembered, that in this action in this court at this present term of said court, on December 23, 1909, the Honorable C. H. Hanford, Judge presiding, the following proceedings were had, to wit:

The defendants tendered their motion and affidavit praying leave to file a supplemental answer herein, which said motion and affidavit were as follows, to wit:

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Come now the defendants and by leave of the Court first had and obtained renew their application for leave to file a supplemental answer herein, and move the Court that an order be made allowing and permitting them to file their supplemental answer herein.

This motion is based on the affidavit filed herein in support of defendants' former application, and on the affidavit hereto annexed.

CHAS. F. MUNDAY,
Attorney for Defendants.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

State of Washington,
County of King,—ss.

Chas. F. Munday, being first duly sworn, on oath says: I am attorney for the defendants in the above-entitled action. I know the contents of the supplemental answer tendered by the defendants herein. The facts therein stated are true as I am informed and verily believe.

CHAS. F. MUNDAY.

Subscribed and sworn to before me this 23d day of December, A. D. 1909.

[Seal] CLIFFORD J. ANDRUSS,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Motion and Affidavit.

That at the same time and place the defendants tendered their proposed supplemental answer in the words and figures following, to wit:

[Proposed Supplemental Answer.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

SUPPLEMENTAL ANSWER.

Come now the defendants and by leave of Court first obtained file herein their supplemental answer to the complaint herein showing facts which have occurred since the former answer was filed herein, and allege:

I.

That on, to wit, the 4th day of December, A. D. 1909, in an action then pending in the Supreme Court of the Province of British Columbia, Dominion of Canada, sitting at Vancouver, said court being a court of record of common-law jurisdiction, in which action these defendants were the plaintiffs, and the plaintiff herein was defendant, and in which action the said Court had jurisdiction over the persons of all of the parties and jurisdiction over the subject matter, and which action was commenced before this action was commenced, and in which action the de-

fendant therein, plaintiff in this action, had filed his counterclaim seeking to recover from these defendants, plaintiffs in that action, on the same facts and the same cause of action set up and alleged by the plaintiff in this complaint in this action, and upon which he seeks to recover herein, a judgment was duly given and rendered and entered in favor of said Lester W. David, plaintiff herein, and defendant in said action, wherein and whereby it was ordered and adjudged that the complaint of the plaintiffs in said action should be dismissed with costs (these defendants by their said complaint in said action seeking to recover on the same facts and the same cause of action pleaded by them in this action), and wherein and whereby it was further ordered and adjudged that the defendant in said action, to wit, said Lester W. David, do recover against the plaintiffs in said action, to wit, these defendants, on his counterclaim the sum of $77,500.00, with interest and costs, the amount of the recovery being the same as is prayed for by the said Lester W. David in his complaint in this action, which said judgment as so entered was and is in the words and figures following, to wit:

In the Supreme Court of British Columbia.

BETWEEN

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs,

and

LESTER W. DAVID,

Defendant.

Before the Honorable Mr. Justice MORRISON.

Saturday, the 4th day of December, 1909.

This action coming on for trial on the 3d day of December, 1909, before this court, at the city of Vancouver, B. C., in the presence of Mr. E. P. Davis, K. C. and Mr. J. W. Pugh, of counsel for the plaintiffs, and Mr. E. V. Bodwell, K. C. and Mr. R. L. Reid, K. C. of counsel for the defendant, upon having read the pleadings and what was alleged by counsel aforesaid this Court was pleased to direct this action to stand over for judgment and the same coming on this day for judgment:

This Court doth order and adjudge that this action be and the same is hereby dismissed with costs to be paid by the plaintiffs to the defendant forthwith after taxation hereof:

And this Court doth further order and adjudge that the defendant do recover against the plaintiff on his counterclaim the sum of $77,500.00, with interest on $25,000.00 thereof at five per cent per annum from the 1st day of March, 1908, to judgment and with interest on $52,500.00 from the 8th day of February, 1908, until judgment at the rate of six and one-half per cent per annum, together with costs to be paid by the plaintiffs to the defendant forthwith after taxation. Item "D" of the counterclaim for interest on $50,000.00 at the rate of seven per cent per annum from the 8th day of February, 1908, to the 7th day of March, 1908, is to stand over for decision by this Court at a later date on application of the defendant herein. Execution on the counterclaim to be stayed for ten days and afterwards pend-

ing appeal if the plaintiffs do within the said space of ten days or such further time as may be allowed by the Court or a Judge, give notice of appeal herein to the next sitting of the Court of Appeal, and also give security to the satisfaction of the Registrar for the payment of the amount for which judgment is given on the counterclaim herein.

By the Court:

"A. B. POTTENGER,"

District Registrar.

That thereafter, and on, to wit, the 6th day of December, 1909, these defendants, plaintiffs in said action, did appeal to the Court of Appeal of British Columbia from so much of said judgment as dismissed their complaint in said action; that no appeal was taken from the judgment so rendered and given in favor of said David on his counterclaim in that action, and that said judgment so rendered and given in favor of said David and against these defendants in said action, is still in full force and effect, and has not been appealed from or in any way vacated or annulled; that said judgment on said counterclaim of said David in said action was rendered and given on the merits, was between the same parties as is this action, was upon the same cause of action, and upon the same facts, which are pleaded by the plaintiff in this action in his complaint herein, and that said judgment was and is conclusive between the parties to that action, and the parties to this action, on said cause of action; that the notice of appeal given by these defendants as aforesaid was and is in the words and figures following, to wit:

In the Supreme Court of British Columbia.

BETWEEN

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs,
(Appellants),

and

LESTER W. DAVID,

Defendant.
(Respondent).

NOTICE OF APPEAL.

Take notice that the above-named plaintiffs hereby appeal to the Court of Appeal from the judgment of the Honorable Mr. Justice Morrison, pronounced herein on the 4th day of December, 1909, dismissing the plaintiff's action.

And take notice that the said Court of Appeal will be moved at the law courts, Bastion Square, Victoria, on Tuesday, the 4th day of January, 1909, at the hour of eleven o'clock in the forenoon, or so soon thereafter as the Court may sit and counsel can be heard by counsel on behalf of the above-named plaintiffs for an order setting aside the judgment and granting a new trial on the following among other grounds:

1. That the said judgment is contrary to law.

2. That the covenant for arbitration in the agreement in question in the said action did not constitute a condition precedent to the plaintiff's right to bring

an action for shortage in the quantity of timber referred to in the said agreement.

3. That the covenant to repay and the covenant to refer in the said agreement are independent and collateral covenants.

Dated the 6th day of December, 1909.

D. G. MARSHALL,
Solicitor for the Plaintiffs.

To D. S. WALLBRIDGE,
Solicitor for the Defendant.

That subsequently these defendants, plaintiffs in said action, on the demand and requirement of said David, did give security to the satisfaction of the registrar for the payment of said judgment, in all respects as required by the terms of said judgment, which security was approved and accepted by the said David, and was filed in said court, and is now in full force and effect, and which security was given by undertaking in the form, words and figures following, to wit:

In the Supreme Court of British Columbia.

BETWEEN

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs,

and

LESTER W. DAVID,

Defendant.

We hereby undertake to pay the amount of the judgment on the counterclaim herein, pursuant to

the terms of the judgment dated the 4th day of December, 1909, a copy of which is attached hereto, within ten days after the judgment of the Court of Appeal on the appeal taken herein has been rendered unless the said judgment of the Court of Appeal be such as to disentitle the defendant to receive payment of such amount, or an order be made by such Court of Appeal ordering the amount on the said judgment and said counterclaim not to be paid over.

Dated this 20th day of December, A. D. 1909.

"THE CANADIAN BANK OF COMMERCE,"
By Its Attorney,
(Sgd.) H. H. MORRIS.

"THE CANADIAN BANK OF COMMERCE,"
By Its Attorneys,
WM. MURRAY."

To Messrs. BOWSER, REID & WALLBRIDGE,
Defendant's Solicitors.

That under the law of British Columbia and the rules of practice and procedure of the courts of British Columbia no judgment can be rendered by the Court of Appeal reversing or modifying the said judgment so given in favor of said David, and against these defendants, or affecting the same other than to extend the time within which the same shall be paid, and staying proceedings for the collection thereof for a specified time, so that in legal effect and according to the law of British Columbia, and the rules, practice and procedure of the courts of British Columbia, the said security is for the absolute and unconditional payment of said judgment at

or before such time as may be fixed by the Court in said action.

II.

In addition to the security aforesaid, the payment of said judgment is further secured to the said David by the stock of the Fraser River Sawmills, Limited, still held in escrow by the Bank of Montreal of New Westminster, British Columbia, of which at least 1,000 shares is still so held in escrow, under the terms of the agreement pleaded by the plaintiff in his complaint herein.

Wherefore there defendants pray that no further proceedings be had or taken in this action on plaintiff's said complaint, and further pray that said complaint herein be dismissed.

CHAS. F. MUNDAY,
Attorney for Defendants.

United States of America,
District of Washington,—ss.

Chas. F. Munday, being first duly sworn, on oath says: That he is the attorney for the defendants above named; that he makes this verification on their behalf, said defendants being out of the District of Washington; that he has read the foregoing supplemental answer, knows the contents thereof, and believes the same to be true.

CHAS. F. MUNDAY.

Subscribed and sworn to before me this 23d day of December, A. D. 1909.

[Seal] CLIFFORD J. ANDRUSS,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Supplemental Answer.

[Order Denying Motion to File a Supplemental Answer, etc.]

That the matter coming regularly on to be heard, plaintiff appearing by E. S. McCord, one of his attorneys, and the defendants appearing by Chas. F. Munday, their attorney, and after argument by counsel, respectively, and after due consideration by the Court, the said motion and application for leave to file said supplemental answer herein was by the Court denied and overruled, to which ruling of the Court the said defendants, by their said attorney, then and there excepted, and now except, which said exception was and is now allowed by the Court, and now the said defendants tender and present the foregoing exception to the said action of the Court, and pray that the same may be settled and allowed and made a part of the record, and the same is accordingly done this the 27th day of December, A. D. 1909.

C. H. HANFORD,
Judge.

[Endorsed]: Defendant's Exceptions on Overruling Application for Leave to File Supplemental Answer. Filed U. S. Circuit Court, Western District of Washington. Dec. 27, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Motion to Dismiss Counterclaim and Setoff in Amended Answer, etc.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Come now the defendants and move the Court for leave to dismiss their counterclaim and setoff pleaded by them in their amended answer in this action, without prejudice, and to withdraw their third affirmative defense pleaded in said answer.

CHAS. F. MUNDAY,
Attorney for Defendants.

[Endorsed]: Motion for Leave to Dismiss. Filed U. S. Circuit Court, Western District of Washington. Dec. 27, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Order Dismissing Counterclaim and Setoff in Amended Answer, etc.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

ORDER DISMISSING COUNTERCLAIM.

Now, on this 27th day of December, 1909, on motion of the defendants, it is ordered that the counterclaim and setoff pleaded by the defendants in their amended answer herein be, and the same hereby is, dismissed, without prejudice, and that leave be, and hereby is, granted to the defendants to withdraw their third affirmative defense pleaded in their said amended answer.

Done in open court this 27th day of December, 1909.

C. H. HANFORD,

Judge.

[Endorsed]: Order Dismissing Counterclaim. Filed U. S. Circuit Court, Western District of Washington. Dec. 27, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Trial [Minutes of the Court—January 6, 1910.]

January 6, 1910.

Now, on this 6th day of January, 1910, this cause comes on regularly for trial, in open court, plaintiff being represented by E. S. McCord, Esquire, and defendants represented by Chas. F. Munday, Esquire, a jury being called, come and answer to their names as follows: Joseph E. Ewing, E. D. Ward, William H. Beard, Ulyses S. Martin, Howard McLeod, George Talbot, Edgar K. Worthington, Patrick Augustus Heney, Hiram Palmer Wickham, Wm. Kohwes, William Henry Vernon and Harlan P. Zimmerman, twelve good and lawful men duly impaneled and sworn. The trial proceeds by the examination of witnesses and the introduction of documentary evidence on the part of the plaintiff. The plaintiff and defendants having rested, the Court instructed the jury as to the amount and nature of the verdict, whereupon, while the jury was still at the bar the

defendants excepted to said instruction, which exception was allowed, and the jury, without leaving the jury-box, returned the following verdict: "We, the jury in the above-entitled cause, being duly impaneled and sworn, do find for the plaintiff, Lester W. David, and against the defendants, Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, and each of them, in the sum of eighty-six thousand seven hundred ninety-eight 62/100 dollars ($86,798.62). Joseph E. Ewing, Foreman."

Whereupon the jury are discharged from further consideration of the cause.

Record of Trial in United States Circuit Court Journal, Volume 1, page 308.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN.

Verdict.

We, the jury in the above-entitled cause, being duly impaneled and sworn, do find for the plaintiff, Lester W. David, and against the defendants, Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, and each of them, in the

sum of eighty-six thousand seven hundred ninety-eight and 62/100 ($86,798.62).

Foreman,

JOSEPH E. EWING.

[Endorsed]: Verdict. Filed U. S. Circuit Court, Western District of Washington. Jan. 6, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Judgment.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

This cause coming on regularly to be heard this 6th day of January, A. D. 1910, Kerr & McCord appeared for plaintiff and Charles F. Munday appeared for the defendants. Testimony was introduced on the part of the plaintiff and after argument of counsel and instructions by the Court the same was duly submitted to a jury duly and regularly impaneled and sworn. Thereafter the jury regularly returned their verdict signed by their foreman, which was in words and figures following, to wit:

"We, the jury, in the above-entitled cause, being duly impaneled and sworn, do find for the plaintiff, Lester W. David, and against the Defendants, Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, and each of them in the sum of eighty-six thousand seven hundred ninety-eight and 62/100 dollars.

JOSEPH E. EWING,
Foreman."

Wherefore, by reason of the law and of the verdict and the premises, it is by the Court ordered, adjudged and decreed that the plaintiff, Lester W. David, do have and recover of and from the defendants, Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, judgment in the sum of eighty-six thousand seven hundred ninety-eight and 62/100 dollars ($86,798.62), with interest thereon at the rate of six per cent from the date hereof until paid, together with his costs and disbursements in this action expended to be taxed by the clerk.

It is further ordered, adjudged and decreed that execution issue herein against the property of the defendants and each of them.

GEORGE DONWORTH,
Judge.

[Endorsed]: Judgment. Filed U. S. Circuit Court, Western District of Washington. Jan. 6, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Western District of Washington.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT et al.,

Defendants.

Memorandum of Costs and Disbursements.

Disbursements.

	Amount Claimed.	Amount Allowed.
Clerk's Fees (To be taxed)	$16.60	$16.60
Marshal's Fees		
Attorney's Fees	20.00	20.00
Commissioner's Fees		
Master in Chancery's Fees		
Reporter's Fees		
Miscellaneous Costs		
Witness Fees		
(Give name, address, number of days of attendance and mileage.)		

$36.*30*

Taxed January 6, 1910.

W. D. COVINGTON,
Deputy Clerk.

United States of America,
Western District of Washington,—ss.

E. S. McCord, being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled cause; and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

[Seal] E. S. McCORD.

Subscribed and sworn to before me this 6th day of January, 1910.

W. D. COVINGTON,
Deputy Clerk U. S. Circuit Court, Western District of Washington.

[Endorsed]: Memorandum of Costs and Disbursements. Filed U. S. Circuit Court, Western District of Washington. Jan. 6, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Petition for New Trial.

Come now the defendants and make and file this their petition for a new trial of this cause on the following grounds, to wit:

I.

Insufficiency of the evidence to justify the verdict, and these petitioners specify the following particulars wherein the evidence is insufficient to justify said verdict:

a. The defendants were not allowed to introduce evidence showing that in an action upon the same cause of action in the Supreme Court of British Columbia, which Court had jurisdiction of the subject matter, and of all the parties, a judgment had previously been rendered in favor of the plaintiff in this action, and against these defendants, for the same amount plaintiff claimed in his complaint in this action, the parties and subject matter being

identical and that the defendants had given security in the said Supreme Court of British Columbia for the payment of said judgment therein rendered.

II.

Error in law occurring at and prior to the trial. These defendants specifying the particular error relied upon as follows:

a. Error of the Court in overruling the defendants' motion for leave to file the supplemental answer herein.

b. Error of the Court in instructing the jury to return a verdict herein in favor of the plaintiff, and against the defendants, for $86,792.62.

This petition is based upon the pleadings and files of this Court in this cause, including the exhibits introduced in evidence at the trial, the minutes of the court, including the clerk's minutes, the notes and memoranda kept by the Judge at the trial, and also the reporter's transcript of his short hand notes of the trial and of the proceedings had and testimony taken thereat.

CHAS. F. MUNDAY,
Attorney for Defendants.

Service of the foregoing petition for retrial and receipt of a copy thereof admitted this 7th day of January, 1910.

KERR & McCORD,
Attorneys for Plaintiffs.

[Endorsed]: Petition for New Trial. Filed U. S. Circuit Court, Western District of Washington. Jan. 8, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Order Denying Petition for New Trial.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT et al.,

Defendants.

This cause coming on to be heard on the petition of the defendants for a new trial herein, and the matter having been submitted to the Court, and the Court being sufficiently advised in the premises does order and direct that said petition for a new trial be, and the same hereby is, denied, to which ruling of the Court the defendants then and there excepted, and their exception is allowed and ordered entered.

Done in open court this 10th day of January, 1910.

GEORGE DONWORTH,

Judge.

[Endorsed]: Order Denying Petition for New Trial. Filed U. S. Circuit Court, Western District of Washington. Jan. 10, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Stipulation [Fixing Time to File a Proposed Bill of Exceptions, etc.].

It is hereby stipulated and agreed by and between the parties hereto that the defendants may have twenty days from and after this date, within which to file in this cause a draft of a proposed bill of exceptions, and that the time for filing such draft of a proposed bill of exceptions may be extended until January 27, 1910, and that a draft of a proposed bill of exceptions herein filed within the time as extended as aforesaid shall be *shall be* considered and agreed to be filed within the time required by the rules of the above-entitled court.

Dated this 7th day of January, 1910.

KERR & McCORD,
Attorneys for Plaintiff.
CHAS. F. MUNDAY,
Attorney for Defendants.

[Endorsed]: Stipulation to Extend Time to Serve Bill of Exceptions. Filed U. S. Circuit Court, Western District of Washington. Jan. 10, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Order Fixing Time to File Proposed Bill of Exceptions.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Upon stipulation of the parties this day filed in this cause, it is ordered that the defendants have twenty days from and after the seventh day of January, 1910, within which to file a draft of a proposed bill of exceptions in this cause, and that the time for filing such proposed bill of exceptions is hereby extended until January 27, 1910.

Done in open Court this 10th day of January, 1910.

GEORGE DONWORTH,

Judge.

O. K.—KERR & McCORD.

[Endorsed]: Order Extending Time to Serve Bill of Exceptions. Filed U. S. Circuit Court, Western

District of Washington. Jan. 10, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Bill of Exceptions.

Be it remembered that in this cause, at this term of this court, and on, to wit, the 23d day of December, 1909, the following proceedings were had, to wit:

The defendants tendered their motion and affidavit praying leave to file their supplemental answer herein, which said motion and affidavit were as follows, to wit:

[Motion (in Bill of Exceptions) to File a Supplemental Answer.]

"In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Come now the defendants and by leave of the Court first had and obtained renew their application for leave to file a supplemental answer herein, and move the Court that an order be made allowing and permitting them to file their supplemental answer herein.

This motion is based on the affidavit filed herein in support of defendants' former application, and on the affidavit hereto annexed.

CHAS. F. MUNDAY,
Attorney for Defendants.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

State of Washington,
County of Kings,—ss.

Chas. F. Munday, being first duly sworn, on oath says: I am the attorney for the defendants in the above-entitled action. I know the contents of the supplemental answer tendered by the defendants herein. The facts herein stated are true as I am informed and verily believe.

CHAS. F. MUNDAY.

Subscribed and sworn to before me this 23d day of December, A. D. 1909.

CLIFFORD J. ANDRUSS,
Notary Public in and for the State of Washington, residing at Seattle."

That at the same time and place the defendants tendered their said proposed supplemental answer in the words and figures following, to wit:

[Proposed Supplemental Answer (in Bill of Exceptions).]

"In the United States Circuit Court for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

SUPPLEMENTAL ANSWER.

Come now the defendants and by leave of Court first obtained file herein their supplemental answer to the complaint herein showing facts, which have occurred since the former answer was filed herein, and allege:

I.

That on, to wit, the 4th day of September, A. D. 1909, in an action then pending in the Supreme Court of the Province of British Columbia, Dominion of Canada, sitting at Vancouver, said court being a court of record of common-law jurisdiction, in which action these defendants were the plaintiffs, and the plaintiff herein was defendant, and in which action the said court had jurisdiction over the persons of all of the parties and jurisdiction over the subject matter, and which action was commenced before this

action was commenced, and in which action the defendant therein, plaintiff in this action, had filed his counterclaim seeking to recover from these defendants, plaintiffs in that action, on the same facts and the same cause of action set up and alleged by the plaintiff in this complaint in this action, and upon which he seeks to recover herein, a judgment was duly given and rendered and entered in favor of said Lester W. David, plaintiff herein, and defendant in said action, wherein and whereby it was ordered and adjudged that the complaint of the plaintiffs in said action should be dismissed, with costs (these defendants by their said complaint in said action seeking to recover on the same facts and the same cause of action pleaded by them in this action), and wherein and whereby it was further ordered and adjudged that the defendant in said action, to wit, said Lester W. David, do recover against the plaintiffs in said action, to wit, these defendants, on his counterclaim the sum of $77,500.00, with interest and costs, the amount of the recovery being the same as is prayed for by the said Lester W. David, in his complaint in this action, which said judgment as so entered was and is in the words and figures following, to wit:

In the Supreme Court of British Columbia.

BETWEEN

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs,

and

LESTER W. DAVID,

Defendant.

Before the Honorable Mr. Justice MORRISON.

Saturday, the 4th day of December, 1909.

This action coming on for trial on the 3d day of December, 1909, before this Court at the City of Vancouver, B. C., in the presence of Mr. E. P. Davis, K. C., and Mr. J. W. Pugh, of counsel for the plaintiffs, and Mr. E. V. Bodwell, K. C., and Mr. R. L. Reid, K. C., of counsel for the defendant, upon having read the pleadings and what was alleged by counsel aforesaid, this Court was pleased to direct this action to stand over for judgment and the same coming on this day for judgment:

This Court doth order and adjudge that this action be and the same is hereby dismissed with costs to be paid by the plaintiffs to the defendant forthwith after taxation hereof:

And this Court doth further order and adjudge that the defendant do recover against the plaintiff on his counterclaim the sum of $77,500.00, with interest on $25,000.00 thereof at five per cent per annum from the 1st day of March, 1908, to judgment, and with interest on $52,500.00 from the 8th day of February, 1908,

until judgment at the rate of six and one-half per cent per annum, together with costs to be paid by the plaintiffs to the defendant forthwith after taxation. Item "D" of the counterclaim for interest on $50,000.00 at the rate of seven per cent per annum from the 8th day of February, 1908, to the 7th day of March, 1908, is to stand over for decision by this Court at a later date on application of the defendant herein. Execution on the counterclaim to be stayed for ten days and afterwards pending appeal if the plaintiffs do within the said space of ten days or such further time as may be allowed by the Court or a Judge give notice of appeal herein to the next sitting of the Court of Appeal, and also give security to the satisfaction of the Registrar for the payment of the amount for which judgment is given on the counterclaim herein.

By the Court,

A. B. POTTENGER,

District Registrar.

That thereafter and on, to wit, the 6th day of December, 1909, these defendants, plaintiffs in said action, did appeal to the Court of Appeal of British Columbia from so much of said judgment as dismissed their complaint in said action; that no appeal was taken from the judgment so rendered and given in favor of said David on his counterclaim in that action, and that said judgment so rendered and given in favor of said David and against these defendants in said action is still in full force and effect, and has not been appealed from or in any way vacated or annulled; that said judgment on said counterclaim

of said David in said action was rendered and given on the merits was between the same parties as is this action, was upon the same cause of action, and upon the same facts, which are pleaded by the plaintiff in this action in his complaint herein, and that said judgment was and is conclusive between the parties to that action, and the parties to this action, on said cause of action; that the notice of appeal given by these defendants as aforesaid was and is in the words and figures following, to wit:

In the Supreme Court of British Columbia.

BETWEEN:

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs (Appellants),

and

LESTER W. DAVID,

Defendant (Respondent).

NOTICE OF APPEAL.

Take notice that the above-named plaintiffs hereby appeal to the Court of Appeal from the judgment of the Honorable Mr. Justice Morrison pronounced herein on the 4th day of December, 1909, dismissing the plaintiff's action.

And take notice that the said Court of Appeal will be moved at the law courts, Bastion Square, Victoria, on Tuesday the 4th day of January, 1909, at the hour of eleven o'clock in the forenoon or so soon thereafter as the Court may sit and counsel can be heard by counsel on behalf of the above-named plaintiffs

for an order setting aside the judgment and granting a new trial on the following among other grounds:

1. That the said judgment is contrary to law.

2. That the covenant for arbitration in the agreement in question in the said action did not constitute a condition precedent to the plaintiff's right to bring an action for shortage in the quantity of timber referred to in the said agreement.

3. That the covenant to repay and the covenant to refer in the said agreement are independent and collateral covenants.

Dated the 6th day of December, 1909.

D. G. MARSHALL,
Solicitor for the Plaintiffs.

To D. S. WALLBRIDGE,
Solicitor for the Defendant.

That subsequently these defendants, plaintiffs in said action, on the demand and requirement of said David did give security to the satisfaction of the registrar for the payment of said judgment, in all respects as required by the terms of said judgment, which security was approved and accepted by the said David, and was filed in said court, and is now in full force and effect, and which security was given by undertaking in the form, words and figures following, to wit:

In the Supreme Court of British Columbia.

BETWEEN:

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs,

and

LESTER W. DAVID,

Defendant.

We hereby undertake to pay the amount of the judgment on the counterclaim herein, pursuant to the terms of the judgment dated the 4th day of December, 1909, a copy of which is attached hereto, within ten days after the judgment of the Court of Appeal on the appeal taken herein has been rendered unless the said judgment of the Court of Appeal be such as to disentitle the defendant to receive payment of such amount, or an order be made by such Court of Appeal ordering the amount on the said judgment and said counterclaim not to be paid over.

Dated this 20th day of December, A. D. 1909.

THE CANADIAN BANK OF COMMERCE,

(Sgd.) By its Attorney, H. H. MORRIS.

THE CANADIAN BANK OF COMMERCE,

By its Attorney, WM. MURRAY.

To Messrs. Bowser, Reid & Wallbridge,

Defendant's Solicitors.

That under the law of British Columbia and the rules practice and procedure of the courts of British Columbia no judgment can be rendered by the Court

of Appeal reversing or modifying the said judgment so given in favor of said David, and against these defendants, or affecting the same other than to extend the time within which the same shall be paid, and staying proceedings for the collection thereof for a specified time, so that in legal effect and according to the law of British Columbia, and the rules, practice and procedure of the Courts of British Columbia, the said security is for the absolute and unconditional payment of said judgment at or before such time as may be fixed by the Court in said action.

II.

In addition to the security aforesaid, the payment of said judgment is further secured to the said David by the stock of the Fraser River Sawmills, Limited, still held in escrow by the Bank of Montreal of New Westminister, British Columbia, of which at least 1000 shares is still so held in escrow, under the terms of the agreement pleaded by the plaintiff in his complaint herein.

Wherefore these defendants pray that no further proceedings be had or taken in this action on plaintiff's said complaint, and further pray that said complaint herein be dismissed.

CHAS. F. MUNDAY,
Attorney for Defendants.

United States of America,
District of Washington,—ss.

Chas. F. Munday, being first duly sworn, on oath says: That he is the attorney for the defendants above named; that he makes this verification on their behalf, said defendants being out of the District of

Washington; that he has read the foregoing supplemental answer, knows the contents thereof, and believes the same to be true.

CHAS. F. MUNDAY.

Subscribed and sworn to before me this 23d day of December, A. D. 1909.

CLIFFORD J. ANDRUSS,

Notary Public in and for the State of Washington, Residing at Seattle."

That said application coming regularly on to be heard, plaintiff appearing by E. S. McCord, one of his attorneys, and the defendants appearing by Chas. F. Munday, their attorney, and after argument by counsel respectively, and after due consideration by the Court, the said motion and application for leave to file said supplemental answer herein was by the Court denied and overruled, to which ruling of the Court the said defendants by their said attorney then and there excepted, which said exception was allowed by the Court, and the said defendants having tendered and presented their said exceptions, to the said action of the Court, and prayed that the same might be settled and allowed and made a part of the record, the same was accordingly done on the 27th day of December, A. D. 1909.

Thereafter and on the 6th day of January, 1910, the said action came regularly on for trial in open court, the Honorable George Donworth presiding, the said day being a day of a regular term of said court, to wit, of the November, 1909, term, the plaintiff appearing in person and by his attorney and counsel, E. S. McCord (of Kerr & McCord), and the

defendants appearing by their attorney and counsel, Chas. F. Munday, when the following proceedings were had, to wit:

A jury was impaneled and sworn according to law to try said cause, and during said trial the following proceedings were had and the following exceptions duly taken:

The said plaintiff through his attorney asked and was granted leave to amend the prayer of his complaint by interlineation, so as to pray for interest on the sum of $27,500.00 at the rate of 6½% per annum from the eighth day of February, 1908, instead of from the first day of April, 1908, and said plaintiff at the same time asked leave to further amend his complaint, so as to strike therefrom the prayer for judgment for interest at the rate of 7% per annum on $50,000.00 from February 8, 1908, to March 7, 1908, and to dismiss so much of plaintiff's said claim, without prejudice, which application was by the Court allowed and granted.

The plaintiff to sustain the issues upon his part offered the testimony of the following witness, and the following evidence as his evidence in chief.

[Testimony of Lester W. David, the Plaintiff, in His Own Behalf.]

LESTER W. DAVID, plaintiff, produced as a witness on his own behalf, being first duly sworn, testified as follows:

"Q. (Mr. McCORD.) You are the plaintiff in this case, are you, Mr. David? A. Yes, sir.

Q. Where was the contract set forth in paragraph I of the complaint, dated the 15th day of July, 1907, executed?

(Testimony of Lester W. David.)

A. In Chicago, Illinois, at the office of Swift & Company.

Q. Is the paper which I hand you, identified as Plaintiff's Exhibit 'A,' the contract to which you just referred? A. Yes, sir.

Q. Is that signed by the defendants in the case and by yourself? A. Yes, sir.

Q. Those are yours and their signatures?

A. Yes, sir.

Mr. MUNDAY.—That is all admitted, Mr. McCord. The contract is set out in the complaint and admitted by the answer.

Mr. McCORD.—I will offer the contract just identified by the witness in evidence, if your Honor please, with the right to withdraw it later.

Mr. MUNDAY.—If your Honor please, I do not think the contract ought to go in; it swells the record and makes the expense of appeal excessive. The contract itself is set out in the complaint and admitted by the defendants, and to put it in evidence will simply make the cost of printing the record that much more, which is wholly unnecessary.

Mr. McCORD.—I simply offer it as the basis of our action. I take it to be the proper practice, your Honor, to put in the record the contract upon which our action is based.

The COURT.—It may come within the rule requiring a chose in action, or making it proper for a chose in action to be filed with judgment is entered on it, and while I do not feel very clear on the subject I will resolve the doubt in favor of admitting the evidence.

(Testimony of Lester W. David.)

Contract referred to offered and received in evidence and marked as Plaintiff's Exhibit 'A.'

Mr. MUNDAY.—If counsel will stipulate that it will not be necessary to print Exhibit 'A' in the record on appeal that will obviate my objection.

Mr. McCORD.—As far as that is concerned, I am perfectly willing to stipulate that in the record on appeal it need not be printed in the record—simply referred to so as to identify it.

Mr. MUNDAY.—Yes; the complaint setting up the contract at length will of course have to be in the record and I will simply refer to the exhibit as being the same contract.

The COURT.—The stipulation will be made part of the record, and the document will be admitted in evidence, with the privilege of withdrawing it.

Q. Now, Mr. David, I will call your attention to this document, which will be Plaintiff's Exhibit 'B,' being a contract dated February 8, 1908, and signed by the purported signatures of the plaintiff and defendants in this action. I will ask you if the signatures attached to that contract are the signatures of the defendants and your own signature?

A. Yes, sir.

Q. Signed in your presence?

A. In Chicago, Illinois.

Mr. McCORD.—I will offer that in evidence as Plaintiff's Exhibit 'B,' your Honor, it being the contract I have just described to the witness.

Mr. MUNDAY.—Same objection to that, your Honor. It is plead in extenso in the complaint and admitted in the pleadings.

(Testimony of Lester W. David.)

Mr. McCORD.—Same stipulation.

The COURT.—Same ruling.

Document referred to offered and received in evidence and marked Plaintiff's Exhibit 'B.'

Q. Now, Mr. David, I notice in the contract which has just been introduced in evidence that you were required under the terms of the contract to deposit a certain number of shares of stock in the Fraser River Sawmills Company, Limited, with the Bank of Montreal, in New Westminister, British Columbia; did you do that?

A. Yes, sir.

Q. Within the time specified in the contract?

A. Yes, sir.

Q. And I will ask you whether or not the agreements on your part to be performed, set forth in the two documents pleaded in the complaint and introduced in evidence as Plaintiffs' Exhibit 'A' and 'B' have been performed by you.

A. Yes, sir, they have.

Q. The total consideration for this contract, the total amount of money to be paid, was how much? Five hundred and two thousand five hundred dollars, was it not? A. Yes, sir.

Q. After applying all the credits, all the amounts that have been paid, what is the balance of the face of the contract now unpaid, exclusive of interest?

A. Seventy-seven thousand five hundred dollars, exclusive of interest.

Q. I will ask you, Mr. David, if you have computed or had computed the interest on the deferred payments under the contract? A. Yes, sir.

(Testimony of Lester W. David.)

Q. Are you able to state the amount of interest that is now due and unpaid? A. Yes, sir.

Q. Now, what is the amount of the earned interest up to to-day on the contracts, Mr. David?

A. The earned interest is nine thousand two hundred and ninety-eight dollars and sixty-two cents.

Q. And the total amount, adding the principal and the interest together, is how much?

A. *Eight-six* thousand seven hundred ninety-eight dollars and sixty-two cents.

Q. Did you make a demand for this money?

A. I did.

Q. On the defendants? A. Yes, sir.

Q. No part of it has been paid?

A. No, sir."

Thereupon the Court instructed the jury as follows:

[Instructions of the Court to the Jury, etc.]

"Gentlemen of the Jury: It is your duty in all cases to find a verdict in accordance with the evidence submitted in court. In this case the evidence can lead to but one result, and in such cases it is proper for the Court to instruct you as to the amount and the nature of your verdict.

I have prepared a verdict which reads as follows:

"We, the jury in the above-entitled cause, being duly impaneled and sworn, do find for the plaintiff, Lester W. David, and against the defendants, Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, and each of them, in the sum of $86,798.62."

It will be your duty to find a verdict in accordance with this form which I have prepared and one of your number will sign it as foreman."

Whereupon while the jury was still at the bar the defendants excepted to said instruction, the jury then without retiring from the box returned a verdict into court on the said 6th day of January, 1910, in the words and figures as they were so instructed by the Court, said verdict being in favor of the plaintiff, and against the defendants, and each of them, in the sum of $86,798.62.

The petition for a new trial was duly made by the defendants, and duly served upon the plaintiff and filed in the court, which petition was upon the following grounds, to wit:

"I.

Insufficiency of the evidence to justify the verdict, and these petitioners specify the following particulars wherein the evidence is insufficient to justify said verdict:

a. The defendants were not allowed to introduce evidence showing that in an action upon the same cause of action in the Supreme Court of British Columbia, which court had jurisdiction of the subject matter, and of all the parties, a judgment had previously been rendered in favor of the plaintiff in this action, and against these defendants, for the same amount plaintiff claimed in his complaint in this action, the parties and subject matter being identical and that the defendants had given security in the said Supreme Court of British Columbia for the payment of said judgment therein rendered.

II.

Error in law occurring at and prior to the trial. These defendants specifying the particular error relied upon as follows:

a. Error of the Court in overruling the defendants' motion for leave to file the supplemental answer herein.

b. Error of the Court in instructing the jury to return a verdict herein in favor of the plaintiff, and against the defendants, for $86,798.62."

Thereafter on the 10th day of January, 1910, the said petition for new trial was submitted to the Court, and the Court denied the same.

The attorneys for the defendants and the plaintiff within the time allowed for filing a bill of exceptions, stipulated that the defendants should have twenty days from and after the seventh day of January, 1910, within which to serve their proposed bill of exceptions, and thereupon the Court within said time for filing said bill of exceptions made an order extending the time for the defendants to serve their proposed bill of exceptions until twenty days from and after the said seventh day of January, 1910.

[Order Settling, etc., Bill of Exceptions.]

And now, in furtherance of justice and that right may be done, the defendants present the foregoing as their bill of exceptions in this case, and pray that the same may be settled, allowed, signed and certified by the Judge, as provided by law. And thereupon the aforesaid Judge at the request of the defendants does hereby allow said bill of exceptions, and does hereby assign, *sell* and certify the same as true and

correct in all particulars, and the same is hereby made a part of the record herein this 12th day of January, 1910.

GEORGE DONWORTH,
District Judge of the United States Presiding in the Circuit Court of the United States for the Western District of Washington, Northern Division.

[Admission of Service of Proposed Bill of Exceptions.]

We admit due service of the foregoing proposed bill of exceptions and the receipt of a true copy thereof this 12th day of January, 1910, and consent that the same may be signed and certified as a true bill of exceptions.

KERR & McCORD,
Attorneys for Plaintiff.

[Endorsed]: Bill of Exceptions. Filed U. S. Circuit Court, Western District of Washington. Jan. 12, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Petition for Writ of Error.

And now come Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, defendants herein, and say:

That on or about the 6th day of January, A. D. 1910, this Court entered judgment herein in favor of the plaintiff, and against these defendants, and each of them, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of these defendants, and each of them, all of which will more in detail appear from the assignment of errors, which are filed with this petition.

Wherefore, these defendants pray that writ of error issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of error so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

CHAS. F. MUNDAY,
Attorney for Defendants.

Service of copy admitted this 13th day of January, 1910.

KERR & McCORD,
Attorneys for Plaintiff.

[Endorsed]: Petition for Writ of Error. Filed U. S. Circuit Court, Western District of Washington. Jan. 13, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

Order Allowing Writ of Error, etc.

This 13th day of January, A. D. 1910, came the defendants, Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, by their attorney, and filed herein and presented to the Court their petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by them praying also that a transcript of the records and proceedings and papers upon which the judgment herein was rendered duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had that may be proper in the premises.

In consideration whereof the Court does allow the writ of error upon the defendants giving bond according to law in the sum of One Hundred and

Seventy-five Thousand Dollars ($175,000), which shall operate as a supersedeas bond.

GEORGE DONWORTH,
Judge.

O. K.—KERR & McCORD.

[Endorsed]: Order Allowing Writ of Error. Filed U. S. Circuit Court, Western District of Washington. Jan. 13, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,
Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,
Defendants.

Assignment of Errors.

The defendants in this action, Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen in connection with their petition for a writ of error herein make the following assignment of errors, which they aver occurred in the trial and in the proceedings had prior thereto in this cause, to wit:

I.

The Court erred in denying and overruling the

motion and application of the defendant for leave to file a supplemental answer herein, the said answer showing and alleging the facts, which occurred after the filing of defendants' original answer herein, and which facts, if proven, would have entitled these defendants to judgment in their favor.

II.

The Court erred in instructing the jury to find a verdict in favor of the plaintiff, and against these defendants.

III.

The Court erred in denying and overruling the defendants' petition for a new trial.

IV.

The Court erred in rendering and entering judgment herein in favor of the plaintiff, and against these defendants.

Wherefore the defendants, the plaintiffs in error, pray the judgment of said Circuit Court may be reversed.

CHAS. F. MUNDAY,
Attorney for Defendants.

We hereby admit due service of the foregoing assignment of errors and the receipt of a copy thereof this 13th day of January, 1910.

KERR & McCORD,
Attorneys for Plaintiff.

[Endorsed]: Assignment of Errors. Filed U. S. Circuit Court, Western District of Washington. Jan. 13, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

No. 1721.

LESTER W. DAVID,
Plaintiff and Defendant in Error,
vs.
EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,
Defendants and Plaintiffs in Error.

Bond on Writ of Error.

Know All Men by These Presents: That we, Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, as Principals, and American Surety Company, a corporation, as surety are held and firmly bound unto the defendant in error, Lester W. David, in the full and just sum of one hundred and seventy-five thousand dollars ($175,000.00), to be paid to the said Lester W. David, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 12th day of January, A. D. 1910.

Whereas, lately at a Circuit Court of the United States for the Western District of Washington, Northern Division, in a suit depending in said Court between Lester W. David, plaintiff, and Edward F.

Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, defendants, a judgment was rendered against said Edward F. Swift, Alexander D. McRae, Andrew D. Davidson and Peter Jansen, and the said Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen have obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Lester W. David citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said Circuit, on the 10th day of February, 1910.

Now, the condition of the above obligation is such that if the said Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, shall prosecute said Writ of Error to effect and answer all damages and costs, if they fail to make the said

plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

EDWARD F. SWIFT.
ANDREW D. DAVIDSON.
ALEXANDER D. McRAE.
PETER JANSEN.

Sealed and delivered in presence of each by
CHAS. F. MUNDAY,
His Attorney.

AMERICAN SURETY COMPANY OF NEW YORK,
By R. D. WELDON,
Resident Vice-president.

[Seal] Attest: F. L. HEMMING,
Resident Assistant Sec'y.

Approved by
GEORGE DONWORTH,
District Judge.

Service of foregoing bond and receipt of copy thereof admitted this 13th day of January, 1910.
KERR & McCORD,
Attorneys for Plaintiff.

[Endorsed]: Bond on Writ of Error. Filed U. S. Circuit Court, Western District of Washington. Jan. 13, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Writ of Error [Copy].

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable Judge of the Circuit Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea, which is in the said Circuit Court before you, or some of you, between Lester W. David, plaintiff, and Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, defendants, a manifest error hath happened to the great damage of the said Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, defendants, as by their answer appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, then that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, on the 10th day of February, next, in the said Circuit Court of Appeals to be then and there held

that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 13th day of January, A. D. 1910.

Allowed by

GEORGE DONWORTH,
U. S. District Judge.

[Seal] Attest: A. REEVES AYRES,
Clerk of the Circuit Court of the United States, Western District of Washington, Northern Division.

By W. D. Covington,
Deputy Clerk.

[Endorsed]: Writ of Error. Filed U. S. Circuit Court, Western District of Washington. Jan. 13, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Citation [Copy].

United States of America,
Ninth Judicial Circuit,—ss.

To Lester W. David, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden

at the city of San Francisco, State of California, in said Circuit, on the 10th day of February next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein Edward F. Swift, Andrew D. Davidson, Alexander D. McRae, and Peter Jansen are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable GEORGE DONWORTH, District Judge of the United States at Seattle, Washington, within said Circuit, this 13th day of January, A. D. 1910.

GEORGE DONWORTH,
U. S. District Judge, Presiding in said Circuit Court.

Service of the above and foregoing citation and of the writ of error therein mentioned is hereby acknowledged this 13th day of January, 1910.

KERR & McCORD,
Attorneys for Defendant in Error, Lester W. David.

[Endorsed]: Citation. Filed U. S. Circuit Court, Western District, Washington. Jan. 13, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Praecipe for Transcript of Record.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,

Plaintiff,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Defendants.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of record on Writ of Error to the Circuit Court of Appeals as follows:

1. Amended and supplemental complaint.
2. Amended answer and counterclaim.
3. Amended reply.
4. Motion to strike from amended reply.
5. Order granting motion to strike from amended reply.
6. Motion and affidavit for leave to file supplemental answer.
7. Order denying leave to file supplemental answer.
8. Exceptions settled December 27, 1909, including motion, affidavit and supplemental answer.

9. Motion for leave to dismiss counterclaim and setoff and to withdraw third affirmative defense.
10. Order granting leave to dismiss counterclaim, etc.
11. Trial.
12. Verdict.
13. Judgment.
14. Cost bill.
15. Petition for new trial.
16. Order denying petition for new trial.
17. Stipulation extending time for filing bill of exceptions.
18. Order extending time for filing bill of exceptions.
19. Bill of exceptions.
20. Petition for Writ of Error.
21. Order allowing Writ of Error.
22. Assignment of errors.
23. Bond on Writ of Error.
24. Writ of Error.
25. Citation.

CHAS. F. MUNDAY,
Attorney for Defendants.

[Endorsed]: Praecipe for Transcript. Filed U. S. Circuit Court, Western District of Washington. Jan. 13, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Certificate of Clerk United States Circuit Court to Transcript of Record.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1721.

LESTER W. DAVID,
Plaintiff and Defendant in Error,

vs.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,
Defendants and Plaintiffs in Error.

United States of America,
Western District of Washington,—ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the Western District of Washington, do hereby certify the foregoing one hundred and three (103) typewritten pages, numbered from 1 to 103, inclusive, to be a full, true and correct copy of so much of the record and proceedings in the above and foregoing entitled cause, as is called for by the praecipe of attorney for defendants, and plaintiffs in error, as the same remain of record and on file in the office of the Clerk of the said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that I annex hereto and herewith transmit the Original Writ of Error and Citation.

I further certify that the cost of preparing and certifying the foregoing return to Writ of Error is the sum of $80.20, and that the said sum has been paid to me by Mr. Chas. F. Munday, attorney for defendants and plaintiffs in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at Seattle, in said District, this 28th day of January, 1910.

[Seal] A. REEVES AYRES,
Clerk.
By W. D. Covington,
Deputy Clerk.

In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit.

Writ of Error [Original].

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable Judge of the Circuit Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea, which is in the said Circuit Court, before you, or some of you, between Lester W. David, plaintiff, and Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, defendants, a manifest error hath happened to the great damage of the said Edward F. Swift, Andrew D. Davidson, Alexander

D. McRae and Peter Jansen, defendants, as by their answer appears, we being willing that error, if any, hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, then that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, on the 10th day of February, next, in the said Circuit Court of Appeals to be then and there held that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 13th day of January, A. D. 1910.

Allowed by

GEORGE DONWORTH,
U. S. District Judge.

[Seal] Attest: A. REEVES AYRES,
Clerk of the Circuit Court of the United States, Western District of Washington, Northern Division.

By W. D. Covington,
Deputy Clerk.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit. Lester W. David, Plaintiff and Defendant in Error, vs. Edward F. Swift et al., Defendants and Plaintiffs in Error. Writ of Error. Filed U. S. Circuit Court, Western District of Washington. Jan. 13, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

Citation [Original].

United States of America,
Ninth Judicial Circuit,—ss.

To Lester W. David, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said Circuit, on the 10th day of February next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable GEORGE DONWORTH, District Judge of the United States, at Seattle, Washington, within said Circuit, this 13th day of January, A. D. 1910.

GEORGE DONWORTH,
U. S. District Judge, Presiding in said Circuit Court.

Service of the above and foregoing citation and of the writ of error therein mentioned is hereby acknowledged this 13th day of January, 1910.

KERR & McCORD,
Attorneys for Defendant in Error, Lester W. David.

[Endorsed]: No. 1721. In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit. Lester W. David, Plaintiff and Defendant in Error, vs. Edward F. Swift et al., Defendants and Plaintiffs in Error. Citation. Filed U. S. Circuit Court, Western District of Washington. Jan. 13, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Endorsed]: No. 1823. United States Circuit Court of Appeals, for the Ninth Circuit. Edward F. Swift, Andrew D. Davidson, Alexander D. McRae and Peter Jansen, Plaintiffs in Error, vs. Lester W. David, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

Filed February 7, 1910.

F. D. MONCKTON,
Clerk.

No. 1822

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STEAMSHIP COMPANY (a corporation), claimant of the American steamship "Santa Rita", her tackle, apparel and furniture, and all persons intervening for their interests therein,

Appellants,

vs.

A. SCHILLING & COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLEE.

WILLIAM DENMAN,
Proctor for Appellee.

Filed this.....day of March, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

FERNAU PUBLISHING CO.

No. 1822

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STEAMSHIP COMPANY (a corporation), claimant of the American steamship "Santa Rita", her tackle, apparel and furniture, and all persons intervening for their interests therein,

Appellants,

vs.

A. SCHILLING & COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLEE.

Inasmuch as this case is precisely similar to the case numbered 1821, now pending in this court, entitled United Steamship Company (a corporation), claimant of the American Steamer "Santa Rita", etc., appellant, v. Thomas Haskins and Max Schwabacher, partners doing business under the firm name of Leege & Haskins, appellees, except as to the amount of coffee involved,

and as both cases below were tried on the evidence of both, and as these two cases have been considered together by appellee in its brief filed in that case, it respectfully refers the court to such brief, and asks that it may be considered also the brief in the case first above entitled.

Respectfully submitted,

WILLIAM DENMAN,

Proctor for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH JUDICIAL DISTRICT

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE, and PETER JANSEN, *Plaintiffs in Error,* vs. LESTER W. DAVID, *Defendant in Error.*	No. 1823.

Upon Writ of Error from the United States Circuit Court for the Western District of Washington, Northern Division

Brief of Defendant in Error

E. S. McCORD,
and J. A. KERR
Attorneys for Defendant in Error,
SEATTLE, WASHINGTON.

NORTHWESTERN P'T'G CO., 83 W. PIKE ST.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH JUDICIAL DISTRICT

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE, and PETER JANSEN, *Plaintiffs in Error,* vs. LESTER W. DAVID, *Defendant in Error.*	No. 1823.

Upon Writ of Error from the United States Circuit Court for the Western District of Washington, Northern Division

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF FACTS.

This action was commenced in the Superior Court of King County, Washington, in September, 1908, to recover the sum of $77,500 owing to the plaintiff by the defendants on account of the unpaid purchase price of

certain shares of stock in a British Columbia corporation known as the Fraser River Saw Mills, Limited, in accordance with the provisions of the contract of July 15th, 1907, executed by the plaintiff and defendants as set forth in the transcript of record, pages 1 to 17.

The defendants were served with process and afterwards appeared and caused the action to be removed to the United States Circuit Court for the Western District of Washington, Northern Division, upon the ground of diversity of citizenship. The plaintiff afterward filed an amended and supplemental complaint (Transcript of Record, 2-19). To the amended and supplemental complaint the defendants, on May 10th, 1909, filed an amended answer. (Transcript of Record, 20-30.) The plaintiff filed a reply to the amended answer on September 27th, 1909. (Transcript of Record, 30-34.)

The issues were, therefore, made up between the parties and the cause was duly assigned to be tried on January 6th, 1910. After the issues had been made up and the cause assigned for trial the defendants, on the 27th day of December, 1909, filed their motion to dismiss their counterclaim and set off pleaded by them in their amended answer without prejudice and to withdraw their third affirmative defense pleaded in said answer. (Transcript of Record, 56.) On the same day the court granted said motion and dismissed the counterclaim and set off as well as the third affirmative defense. (Transcript of Record, 57.) Thereafter, on the same day, the defendants asked leave of court to file the proposed supplemental answer and the court denied the motion and application for leave

to file the supplemental answer herein. (Transcript of Record, 91.) Thereafter the cause proceeded to trial and on the 6th of January, 1910, judgment was entered in favor of the plaintiff and against the defendants for $86,798.62 with interest at 6 per cent per annum from said date. (Transcript of Record, 60-61.)

The defendants have made four assignments of error. (Transcript of Record, 91-92.) In their argument, however, they have practically abandoned the second, third and fourth assignments and have relied solely upon the first assignment of error, which is as follows:

"The Court erred in denying and overruling the motion and application of the defendants for leave to file a supplemental answer herein, the said answer showing and alleging the facts, which occurred after the filing of defendants' original answer herein, and which facts, if proven, would have entitled these defendants to judgment in their favor."

ARGUMENT.

An examination of the pleadings in this cause will show that the plaintiff agreed to sell to the defendants 6700 shares of stock in the Fraser River Saw Mills, Limited, at $75 per share, payable in certain installments as specified in the first paragraph of the contract. The third paragraph of the contract provides that the plaintiff should give a satisfactory guarantee to the defendants that the quantity of timber on the different tracts of land, as shown by the statement of the Fraser River Saw Mills, Limited, a corporation, under date of April 30th, 1907, was true and accurate, it being the intention and one of the conditions of the trade that the timber lands should

at least run equal in quantity to the number of feet shown on the statement attached to the contract. (Transcript of Record, 5.) The statement referred to is found on pages 11 to 15 of the record.

In the amended answer (Transcript of Record, 20-29) the defendants admit the execution of the contract and admit that the balance due plaintiff under the terms of the contract pleaded was substantially the amount prayed for in the complaint; but the defendants claim in their amended answer that there was a shortage of timber on the lands held by the Fraser River Saw Mills, Limited, and that the timber land described and referred to in said agreement did not contain at that time and does not now contain the quantity of timber in the aggregate, or on the several tracts, as so guaranteed by the plaintiff, and that upon a cruising and verification made by defendants within the time provided in the agreement and modifications thereof it was ascertained by the defendants that the quantity of timber on said various tracts failed to reach the quantity represented in the statement attached to the agreement of July 15th, 1907, but did find that said timber lands contained a much less quantity of timber than was so represented and guaranteed by the plaintiff, and that the quantity of timber upon said various tracts was, at the various prices as guaranteed in the agreement of July 15th, 1907, of the actual value of $244,291.79 less than was so represented and guaranteed by the plaintiff, and that the just proportion that the amount of shortage bore to the total number of feet of timber estimated and guaranteed by the plaintiff to be

on said tracts, as shown by said agreement and statement, was the sum above mentioned, and that plaintiff by reason of such shortage became obligated, under the terms of said agreement to repay to the defendants the said sum last mentioned. (Transcript of Record, 24.) And further, in the amended answer and in the third affirmative defense thereof, the defendants pleaded the following provision of the contract of July 15th, 1907, which is as follows:

"It is further agreed that in event second party" (the defendants) "fails to find the quantity of timber on said tracts represented by the statement of April 30th, 1907, attached hereto, and said party fails to agree on a basis of settlement concerning such shortage, then and in that event an arbitration committee composed of three men, one named by each of the respective parties hereto and the two thus named agreeing on and naming a third, which arbitration committee will and shall have full power to settle the matter regarding shortage, and whose action and decision in the matter shall be final." (Transcript of Record, 25.)

and claimed that a dispute having arisen the plaintiff could not maintain his action upon the contract until the matter in dispute had been first submitted to arbitration.

The defendants in their amended answer set up a counterclaim against the plaintiff for $244,291.79, growing out of the alleged shortage of timber.

It was upon the issues as made up that the case was assigned for trial, and after the issues had been thus made up and the defendants were asserting their counterclaim in this action against the plaintiff, they voluntarily dismissed their counterclaim and affirmative defenses contained in their amended answer and voluntarily left the

jurisdiction of the court so far as the counterclaim growing out of the alleged shortage of timber was concerned.

The timber lands referred to in the contract set forth in the complaint are located in the Province of British Columbia. After the issues had been made up in this case the plaintiff happened to visit Vancouver, B. C., and was there served with process in an action instituted in British Columbia by the defendants in this cause against the plaintiff, to recover approximately the sum of $250,000, and as a basis of their claim they alleged that the plaintiff became obligated to pay them the said sum on account of the shortage of the timber referred to in the contract of July 15th, 1907. In other words, in the action in the British Columbia court the defendants in this action were suing the plaintiff for the identical same cause of action set forth in their amended answer in this court. The situation of the parties was simply reversed, the plaintiff in this cause becoming the defendant in the foreign court, and the defendants in this cause becoming the plaintiffs.

After the plaintiff herein was served with process in British Columbia he appeared and filed an answer to the complaint and set up by way of counterclaim his claim against the defendants for $77,500. The action came on for trial in British Columbia and the trial court held that the action could not be maintained by the defendants against the plaintiff for the reason that the agreement of July 15th, 1907, provided for a submission of the dispute as to a shortage to a board of arbitration, and that until it had been so submitted no action could be maintained

in the British Columbia court, and the action of the defendants in the British Columbia court was dismissed, but judgment was entered in favor of the plaintiff against the defendants upon the counterclaim for $77,500. This judgment was entered on December 3d, 1909. The defendants appealed to the Supreme Court of British Columbia from the judgment dismissing their action, and filed a supercedeas bond, as provided in the judgment entered in the British Columbia court. (Transcript of Record, 74-75.) The form of the bond is found on page 78 of the record, and is as follows:

"We hereby undertake to pay the amount of the judgment on the counterclaim herein, pursuant to the terms of the judgment dated the 4th day of December, 1909, a copy of which is attached hereto, within ten days after the judgment of the Court of Appeal on the appeal taken herein has been rendered, unless the said judgment of the Court of Appeal be such as to disentitle the defendant to receive payment of such amount, or an order be made by such Court of Appeal ordering the amount on the said judgment and said counterclaim not to be paid over."

The court will observe that this bond does not provide as counsel contends, for the payment of the judgment upon the counterclaim at all events. It is conditional. The surety upon the bond undertakes to pay the judgment upon the counterclaim "within ten days after the judgment of the Court of Appeal on the appeal taken in the cause has been rendered, unless said judgment of the Court of Appeal be such as to disentitle the defendant

to receive payment of such amount, or an order be made by such Court of Appeal ordering the amount on said judgment and said counterclaim not to be paid over." In other words, the payment of the judgment is conditioned upon the future action of the foreign court.

The defendant contends that the entry of said judgment in the Supreme Court of British Columbia and the execution of the bond above referred to, constituted a plea in bar to the prosecution of this action in the courts of the United States.

We have outlined the proceedings in order that the court may be placed in a position to understand the situation. The defendant, before the action was commenced in British Columbia and before any service was had, were in this court and in this action and had filed their counterclaim, which was substantially the same as their complaint in the foreign court. They voluntarily withdrew from this court, went into a foreign jurisdiction, and transferred, in so far as they could, the litigation from the Federal Court to the foreign court, and now come back into this court and plead the action of the foreign court as a bar to the proceedings in this court, a court which first acquired and assumed jurisdiction of the controversy and of the parties, and after the issues had been made up here and the British Columbia court had refused to stay proceedings in that court, although that court knew of the pendency of the proceedings in this court. Comity demanded that the foreign court should stay proceedings

and allow the courts of this country that had first assumed jurisdiction to proceed with the conduct of the litigation; and the trial court in this cause, after such action on the part of the foreign court, was under no duty or obligation to recognize any action taken by the British Columbia court that attempted to oust the trial court of jurisdiction, and the defendants in this action were not in any position to ask a stay of proceedings on the part of the trial court. They had an opportunity to have their counterclaim against the plaintiff tried out in this court, but they voluntarily declined to have the same adjudicated in the courts of this country, and the effect of what the defendants are attempting to do is to stay the collection of the plaintiff's judgment until the validity of their counterclaim can be adjudicated in a foreign court.

This court can readily from an examination of the record and of the bond given in the foreign court ascertain that the sole purpose of this proceeding is to stay the collection of the plaintiff's judgment until the matter involved in the counterclaim has been tried out and they have waived their right to have the subject matter of the counterclaim judicially determined by first coming into the trial court, setting up their counterclaim and afterward withdrawing the same. Their position shows but little respect for the jurisdiction of the courts of this country and they are not entitled to any stay of proceedings in this action and not entitled to any relief, which manifestly is sought to gain a stay. It makes no differ-

ence whether the form of the supplemental answer asks for a stay, or whether it does not,—the net result is to obtain a stay of the judgment in this court until the validity of the counterclaim can be determined by the British Columbia court.

It is true that the defendants contend in their brief, page 12, that this is not a case of pleading another action pending in abatement, but in effect is pleading a prior judgment and satisfaction thereof in bar. But the record discloses that the amount represented by David's judgment has never been paid and has never been satisfied. If the British Columbia judgment upon the counterclaim had been paid and David had received the money, of course such payments could have been pleaded in bar of the action in this court, but we contend that the record does not bear out any such contention. The bond, as we have before stated, is conditional. It is conditional upon the future action of the Supreme Court of British Columbia. It is not a promise to pay unconditionally, but is dependent upon whatever action the British Columbia court may take with reference to the subject matter involved in the counterclaim pleaded by defendant in this action. Counsel contend that because of the execution of the bond rendered necessary in order to enable the defendant to appeal from the judgment of the British Columbia court, operates as a payment or satisfaction of this judgment. It neither satisfies the judgment of this court, nor the judgment upon the counterclaim rendered

by the British Columbia court and it is doing violence to the language of the record to make any such assertion.

Moreover the sufficiency of the bond given by the Canadian Bank of Commerce was never submitted to Mr. David. He had no opportunity to determine the value thereof. The bond was not approved by David, but presumably by the Clerk of the Supreme Court of British Columbia. The plaintiff ought not to be bound, even though the bond be treated as security for the judgment rendered in British Columbia, when he had nothing to do with the approval of the bond, or anything whatever to say as to the solvency of the surety, or the conditions of the bond or security.

Counsel cites the case of *Lawrence v. Remington*, 6 Bissell 44 (Federal Cases No. 8141.) In that action the plaintiff had commenced a suit in the State Court of Iowa and had attached property of the defendant of a much greater value than plaintiff's claim, and the court in the Lawrence case permitted the pendency of the action in the Iowa court to be pleaded in abatement of the action in the Federal Court, but the court says in the opinion:

"It is now well settled that a judgment of the state court of competent jurisdiction merges the causes of action, so that a suit in the Federal court cannot be maintained in the same cause of action. According to that doctrine I do not discover any reason for holding that the pendency of such suit should not be pleaded in abatement. If the judgment, when recovered, would be a bar, the pendency of the suit to recover it should operate as a suspension of the right to sue upon the same cause of action during such pendency."

"The reason of the foregoing decision rests upon the provision of the Constitution and laws of the United States requiring each state to give full faith and credit to the judgments of the courts of other states of the Union."

23 Cyc. 1545.

"But the rule is different with regard to judgments rendered in the courts of a foreign country. Such a judgment does not merge the original cause of action and prevent a suit on the original claim or demand, although payment and satisfaction of it may be pleaded in bar of an action on the original cause in the domestic courts."

Id. 1605.

"Judgments rendered in France, or in any other foreign country, by the laws of which judgments rendered in the United States are reviewable upon the merits, are not entitled to full credit and conclusive effect, but are only prima facie evidence of the justice of plaintiff's claim."

Hilton v. Guyott, 159 U. S. 113.

"By our law at the time of the adoption of the Constitution, a foreign judgment was considered as prima facie evidence and not conclusive. There is no statute of the United States, and no treaty of the United States with France or with any other nation which has changed this law or has made a provision upon the subject. It is not to be supposed that if any statute or treaty had been or should be made it would recognize as conclusive the judgments of any country which did not give like effect to our own judgments. In the absence of statute or treaty it appears to us equally unwarrantable to assume that the comity of the United States requires anything more."

Id.

"There is some uncertainty concerning some of the effects of a foreign judgment. But there is none as to this particular: It does not operate as a merger of the original cause of action. The fact that *assumpsit* lies on a foreign judgment is decisive, that the demand has not passed into a security of a higher nature, so as to operate as a technical merger.

N. Y. L. & E. Co. v. McHenry, 17 Fed. 414.
Lyman v. Brown, 2d Curt., C. C., 559.

Counsel also cites the case of *Douglass v. Phoenix Insurance Company of Brooklyn,* 33 N. E. 938. The decision in this case was based upon the Federal laws requiring full force and credit to be given to the judgments of sister states; and in the case of *Oneida County Bank v. Herbender,* 4 N. E. 332, cited by counsel it was held that the pendency of an action upon contract in the United States court is no bar on another action in the state court to enforce the same cause of action. We see no applicability of these cases to the one at bar.

The plaintiff in this action had the undoubted legal right to prosecute his action upon the original contract, both in the courts of this country and in the courts of British Columbia, and could prosecute both of them to judgment at the same time and a judgment rendered in plaintiff's favor in the courts of British Columbia could not be construed in such a way as to prevent plaintiff from prosecuting his action upon the original cause of action in the Federal Courts of this country.

But we call the court's attention to the record in this case, and particularly to the fact that before the plaintiff

was ever served with process in the Canadian court the action upon the contract upon which judgment was finally rendered was pending in the Federal Court in Seattle, and the issues had been made up. Under the authorities we have cited there is nothing to sustain the contention of a technical merger of the cause of action on the Canadian judgment.

The transcript of the proceedings of the Canadian court as contained in the supplemental answer offered does not show a payment of the judgment rendered in the British Columbian court. It does not show any security given for that judgment that was ever approved by David. It does not show any bond agreeing unconditionally to pay the judgment at any fixed time; but it does affirmatively disclose that the judgment is to be paid provided the Canadian court directs it to be paid by some future order, vesting in the Canadian court the absolute power to prevent its payment if it so desired; and it is apparent from the record in this case that the sole purpose of the plea contained in the supplemental answer is to delay the enforcement of the judgment rendered in this cause until the defendants can try out their counterclaim and have its validity determined by the Canadian court,—and this attempt to evade the jurisdiction of the courts of this country and to prevent the courts of this country from determining the validity of such counterclaim is certainly a proceeding that ought not to appeal to the consideration of this court. Such a proceeding tends to bring reproach upon our courts.

The defendants in this action had an opportunity to have litigated all of the questions arising under the contract. They could have had their counterclaim determined, as well as the claim of the plaintiff and the one could have been offset as against the other if the facts so warranted. Notwithstanding the action of the defendants in coming into our courts, setting up their defenses and counterclaim, and afterward withdrawing them and going into a foreign jurisdiction and instituting proceedings thereon, they now come back into the trial court and ask him to stay plaintiff's cause of action until the Canadian court can determine the controversy involved in the counterclaim.

This is the only error argued by counsel for the defendants, and we think it is perfectly apparent to this court that the sole purpose of appealing this cause to this court is to delay Mr. David in the enforcement of his judgment until the Canadian court can pass upon the sufficiency of his counterclaim; and so far as the judgment in favor of the plaintiff in British Columbia is concerned we think that no plea in regard to the same could legally be interposed in this action, except that of payment.

Counsel says on page 15 of his brief that if Swift et al. can now be made to satisfy the judgment rendered in this action, they will have been required to satisfy the same debt twice. There is no merit in this contention. Should the defendants pay this judgment and satisfy the same, such payment can be interposed against the enforcement of a judgment rendered in the Supreme Court of British Columbia. Defendants cannot be made to pay

a judgment twice. In this controversy the defendants have not only not paid it twice, or satisfied it twice, but they have not paid it, or any part of it at all.

Counsel further says that except for the stay of execution granted upon the security given, referring to the bond, that David would have proceeded to collect his judgment by execution, notwithstanding the appeal by Swift et al. from the judgment dismissing their complaint. We call the court's attention to the language of the bond, which expressly provides that the surety will pay the bond when directed so to do by the Canadian court.

We confidently believe that this court will be forced to the conclusion that the interposition of the plea contained in the supplemental answer was made solely for the purpose of delaying the plaintiff in the collection of his judgment entered in this action.

There was no error in the trial court in refusing to permit the supplemental answer to be filed, as it contained no defense to the action and did not constitute a bar.

There is no error in the record and the judgment should be affirmed.

Respectfully submitted,

KERR & McCORD,

Attorneys for Defendant in Error.

NO. 1823

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH JUDICIAL CIRCUIT

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE, and PETER JANSEN, *Plaintiffs in Error.* vs. LESTER W. DAVID, *Defendant in Error.*	No. 1823

Upon Writ of Error from the United States Circuit Court for the Western District of Washington, Northern Division

BRIEF OF PLAINTIFFS IN ERROR

CHAS. F. MUNDAY,
Attorney for Plaintiffs in Error

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH JUDICIAL CIRCUIT

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE, and PETER JANSEN, *Plaintiffs in Error.* vs. LESTER W. DAVID, *Defendant in Error.*	No. 1823

Upon Writ of Error from the United States Circuit Court for the Western District of Washington, Northern Division

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF FACTS.

The plaintiff sued the defendants in this action to recover $77,500.00, being the amount claimed to be unpaid on a contract for the sale of certain corporate stock. The action was begun and service had

upon the defendants in September, 1908. An amended complaint was served January 12, 1909, to which defendants served an amended answer and counterclaim April 5, 1909. An amended reply was served September 27, 1909, to which a motion to strike was addressed, which was allowed October 16th, 1909, the case being then brought to issue. Subsequently the defendants by leave of Court dismissed their counterclaim without prejudice.

On December 23rd, 1909, the defendants made proper application to the Court for leave to file a supplemental answer in form as follows:

IN THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

LESTER W. DAVID,

Plaintiff.

—*vs.*—

No. 1721.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN, *Defendants.*

SUPPLEMENTAL ANSWER.

Come now the defendants and by leave of court first obtained file herein their supplemental answer to the complaint herein showing facts, which have occurred since the former answer was filed herein, and alleges:

I.

That on to-wit, the 4th day of December, A. D. 1909, in an action then pending in the Supreme Court of the Province of British Columbia, Dominion of Canada, sitting at Vancouver, said court being a court of record of common law jurisdiction, in which action these defendants were the plaintiffs, and the plaintiff herein was defendant, and in which action the said court had jurisdiction over the persons of all of the parties and jurisdiction over the subject matter, and which action was commenced before this action was commenced, and in which action the defendant therein, plaintiff in this action, had filed his counterclaim seeking to recover from these defendants, plaintiffs in that action, on the same facts and the same cause of action set up and alleged by the plaintiff in this complaint in this action, and upon which he seeks to recover herein, a judgment was duly given and rendered and entered in favor of said Lester W. David, plaintiff herein, and defendant in said action, wherein and whereby it was ordered and adjudged that the complaint of the plaintiffs in said action should be dismissed, with costs (these defendants by their said complaint in said action seeking to recover on the same facts and the same cause of action pleaded by them in this action), and wherein and whereby it was further ordered and adjudged that the defendant in said action, to-wit, said Lester W. David, do recover against the plaintiffs in said action,

to-wit, these defendants, on his counter claim the sum of $77,500.00, with interest and costs, the amount of the recovery being the same as is prayed for by the said Lester W. David in his complaint in this action, which said judgment as so entered was and is in the words and figures following, to-wit:

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN:

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs.

—and—

LESTER W. DAVID, *Defendant.*

BEFORE THE HONOURABLE MR. JUSTICE MORRISON. | Saturday, the 4th day of December, 1909.

This action coming on for trial on the 3rd day of December, 1909, before this Court at the City of Vancouver, B. C., in the presence of Mr. E. P. Davis, K. C., and Mr. J. W. Pugh of counsel for the plaintiffs, and Mr. E. V. Bodwell, K. C., and Mr. R. L. Reid, K. C., of counsel for the defendant, upon having read the pleadings and what was alleged by counsel aforesaid this Court was pleased to direct this action to stand over for judgment and the same coming on this day for judgment:

THIS COURT DOTH ORDER AND ADJUDGE that this action be and the same is hereby

dismissed with costs to be paid by the plaintiffs to the defendant forthwith after taxation hereof:

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant do recover against the plaintiff on his counter claim the sum of $77,500.00 with interest on $25,000.00 thereof at five per cent. per annum from the 1st day of March, 1908, to judgment and with interest on $52,500.00 from the 8th day of February, 1908, until judgment at the rate of six and one-half per cent. per annum, together with costs to be paid by the plaintiffs to the defendant forthwith after taxation. Item "D" of the counter claim for interest on $50,000.00 at the rate of seven per cent. per annum from the 8th day of February, 1908, to the 7th day of March, 1908, is to stand over for decision by this Court at a later date on application of the defendant herein. Execution on the counterclaim to be stayed for ten days and afterwards pending appeal if the plaintiffs do within the said space of ten days or such further time as may be allowed by the Court or a Judge, give notice of appeal herein to the next sitting of the Court of Appeal and also give security to the satisfaction of the Registrar for the payment of the amount for which judgment is given on the counterclaim herein.

BY THE COURT

"A. B. POTTENGER,"

District Registrar.

That thereafter and on to-wit, the 6th day of December, 1909, these defendants, plaintiffs in said action, did appeal to the Court of Appeal of British

Columbia from so much of said judgment as dismissed their complaint in said action; that no appeal was taken from the judgment so rendered and given in favor of said David on his counter claim in that action, and that said judgment so rendered and given in favor of said David and against these defendants in said action, is still in full force and effect, and has not been appealed from or in any way vacated or annulled; that said judgment on said counter claim of said David in said action was rendered and given on the merits, was between the same parties as is this action, was upon the same cause of action, and upon the same facts, which are pleaded by the plaintiff in this action in his complaint herein, and that said judgment was and is conclusive between the parties to that action, and the parties to this action, on said cause of action; that the notice of appeal given by these defendants as aforesaid was and is in the words and figures following, to-wit:

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN:

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs
(Appellants)

—and—

LESTER W. DAVID, *Defendant.*
(Respondent)

NOTICE OF APPEAL.

TAKE NOTICE That the above named plaintiffs hereby appeal to the Court of Appeal from the judgment of the Honorable Mr. Justice Morrison pronounced herein on the 4th day of December, 1909, dismissing the plaintiff's action.

AND TAKE NOTICE That the said Court of Appeal will be moved at the law courts, Bastion Square, Victoria, on Tuesday, the 4th day of January, 1909, at the hour of eleven o'clock in the forenoon or so soon thereafter as the Court may sit and counsel can be heard by counsel on behalf of the above named Plaintiffs for an order setting aside the judgment and granting a new trial on the following among other grounds:

1. That the said judgment is contrary to law.

2. That the covenant for arbitration in the agreement in question in the said action did not constitute a condition precedent to the Plaintiff's right to bring action for shortage in the quantity of timber referred to in the said agreement.

3. That the covenant to repay and the covenant to refer in the said agreement are independent and collateral covenants.

Dated the 6th day of December, 1909.

D. G. MARSHALL,
Solicitor for the Plaintiffs.

To D. S. Wallbridge,
Solicitor for the Defendant.

That subsequently these defendants, plaintiffs

in said action, on the demand and requirement of said David, did give security to the satisfaction of the registrar for the payment of said judgment, in all respects as required by the terms of said judgment, which security was approved and accepted by the said David, and was filed in said court, and is now in full force and effect, and which security was given by undertaking in the form, words and figures following, to-wit:

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN:

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs.

—and—

LESTER W. DAVID, *Defendant.*

WE HEREBY UNDERTAKE to pay the amount of the judgment on the counter claim herein, pursuant to the terms of the judgment dated the 4th day of December, 1909, a copy of which is attached hereto, within ten days after the judgment of the Court of Appeal on the appeal taken herein has been rendered unless the said judgment of the Court of Appeal be such as to disentitle the defendant to receive payment of such amount, or an order be made by such Court of Appeal ordering the amount on the said judgment and said counter claim not to be paid over.

Dated this 20th day of December, A. D. 1909.

"THE CANADIAN BANK OF COMMERCE"

By its attorney,

(Sgd) H. H. MORRIS.

"THE CANADIAN BANK OF COMMERCE"

By its attorney,

WM. MURRAY.

To Messrs. Bowser, Reid & Wallbridge,

Defendant's Solicitors.

That under the law of British Columbia and the rules, practice and procedure of the courts of British Columbia, no judgment can be rendered by the Court of Appeal reversing or modifying the said judgment so given in favor of said David, and against these defendants, or affecting the same other than to extend the time within which the same shall be paid, and staying proceedings for the collection thereof for a specified time, so that in legal effect and according to the law of British Columbia, and the rules, practice and procedure of the Courts of British Columbia, the said security is for the absolute and unconditional payment of said judgment at or before such time as may be fixed by the court in said action.

II.

In addition to the security aforesaid, the payment of said judgment is further secured to the said David by the stock of the Fraser River Saw Mills, Limited, still held in escrow by the Bank of Montreal of New Westminster, British Columbia, of which at least 1,000 shares is still so held in escrow,

under the terms of the agreement pleaded by the plaintiff in his complaint herein.

WHEREFORE These defendants pray that no further proceedings be had or taken in this action on plaintiff's said complaint, and further pray that said complaint herein be dismissed.

CHAS. F. MUNDAY,
Attorney for Defendants.

UNITED STATES OF AMERICA,
DISTRICT OF WASHINGTON. } ss.

CHAS. F. MUNDAY, Being first duly sworn, on oath says: That he is the attorney for the defendants above named; that he makes this verification on their behalf, said defendants being out of the District of Washington; that he has read the foregoing supplemental answer, knows the contents thereof, and believes the same to be true.

CHAS. F. MUNDAY.

Subscribed and sworn to before me this 23rd day of December, A. D. 1909.

CLIFFORD J. ANDRUSS,
Notary Public in and for the State of Washington, residing at Seattle.

Objection to the granting of such leave being made, the Court refused to allow such supplemental answer to be filed—on the ground that the facts therein pleaded, if proven, would not constitute a good plea in abatement or in bar to this action.

The Court in refusing leave to file the supplemental answer, treated the objection thereto as a demurrer and refused leave on the ground that if

leave were granted and the supplemental answer filed, a demurrer thereto or an objection to the admission of evidence of the facts pleaded would be sustained.

For the purposes of this argument it must be assumed that all the facts well pleaded in said supplemental answer are true.

ASSIGNMENT OF ERROR.

The several assignments of error filed upon suing out the writ of error herein, may all be resolved into one—that the court erred in refusing leave to the plaintiffs in error to file their supplemental answer.

ARGUMENT.

The facts alleged in said supplemental answer are substantially these:

An action was commenced in the Supreme Court of British Columbia, sitting at Vancouver, by the defendants in this action, Swift, et al., against the plaintiff in this action, David, said action having been commenced before this action was commenced. In that action David filed his counter claim seeking to recover against Swift et al. on the same facts and same cause of action alleged in his complaint in this action. That judgment was rendered on said counter claim as prayed. That the complaint of Swift et al. was at the same time dismissed. That Swift et al. appealed from the judgment dismissing their complaint, but not from the judgment in favor of David on his counter claim.

That Swift et al., upon the demand and requirement of David, gave security for the payment of the judgment recovered by David, which security was approved and accepted by said David.

That under the law of British Columbia and the rules and practice of its courts, no judgment could be rendered by the Court of Appeal reversing or modifying David's judgment or in any way affecting the same, other than to postpone the time when the same should be paid—such security being in effect for the absolute and unconditional payment of said judgment.

Said supplemental answer further alleged that the judgment in favor of David was further secured by the deposit in the Bank of Montreal at New Westminster, British Columbia, of at least 1,000 shares of the stock forming the subject matter of the indebtedness sued upon, and for the purchase price of which David sues herein, which stock had been deposited under the agreement set out in the complaint in this action.

Plaintiffs in error respectfully contend that the facts pleaded in said supplemental answer constitute a complete bar to David's right to recover in this action.

This is not a case of pleading another action pending in abatement, but in effect is pleading a prior judgment and satisfaction thereof, in bar.

The law governing in this case is well laid down in the following decisions:

In *Lawrence vs. Remington*, 6 Bissell 44 (Fed-

eral Cases No. 8141), it was held that the pendency of a suit in a court of general jurisdiction in another state, in which property sufficient to satisfy the demand had been attached, was a bar to a second suit in the Circuit Court, and that the rule that the pendency of an action in a foreign jurisdiction is not pleadable in abatement does not apply where the plaintiff has secured his debt by attachment in such action.

The facts in this case are even stronger to support this rule, for it appears by the allegations of the supplemental answer that plaintiff's claim was reduced to judgment in the foreign jurisdiction and full payment of such judgment secured, while in the case cited no judgment had been recovered in the foreign action.

In *Douglass vs. Phoenix Insurance Company of Brooklyn,* 33 Northeastern Reporter, 938, it was held that while the pendency of a suit *in personam* in one state is not, according to the general rule, pleadable in abatement of a suit subsequently commenced in another state between the same parties on the same cause of action, the recovery of a judgment in one of the actions would be allowed to be set up in bar of the further prosecution of the other.

This case apparently holds that such judgment could be pleaded in bar, without reference to the question as to whether the payment of such judgment had been secured.

In *Oneida County Bank vs. Herbender, et al.,* 4 Northeastern Reporter 332, it was held that a recov-

ery in one action might be pleaded to the further continuance of the other. No question as to whether payment of the judgment had been secured appears to have been considered.

That the judgment set up in the supplemental answer was rendered in the Court of a foreign country, is not material, the conclusiveness of such a judgment being very clearly upheld by many well considered cases.

In this case the supplemental answer alleged not only the recovery of judgment in the Supreme Court of British Columbia, but what in effect amounted to satisfaction thereof, by the giving of security for its payment—which security was for the absolute and unconditional payment of the judgment at the expiration of the stay of execution, the supplemental answer alleging that according to the laws of British Columbia and the practice of its courts, said judgment could not be in any way modified or reversed on the appeal taken by Swift et al. from the judgment dismissing their complaint.

In this connection it would have been shown under the allegations of the supplemental answer that under the laws and practice in British Columbia, in an action where a counter claim is set up, two judgments would be rendered, one in favor of plaintiff on his complaint, and one in favor of defendant on his counter claim, each being entitled to tax his costs, and that an appeal from one of such judgments would not in any way affect the other.

Except for the stay of execution granted upon

the security given, David could have proceeded to collect his judgment by execution—notwithstanding the appeal by Swift et al. from the judgment dismissing their complaint.

The rule that a judgment creditor can have but one satisfaction of his judgment is too well settled to require argument or citation of authority.

If Swift et al. can now be made to satisfy the judgment rendered in this action, they will have been required to twice satisfy the same debt.

The reasons supporting the rule laid down in *Lawrence vs. Remington,* Federal Cases No. 8141, above cited, apply with added force to the facts alleged in the Supplemental Answer offered in this case—to allow this case to proceed was to allow the plaintiffs in error to be harassed and vexed to an extent wholly unnecessary—David having practically in hand, all that he could possibly recover in this action.

It is respectfully submitted that the Court below was in error in refusing leave to the plaintiffs in error to file their supplemental answer and that such error was to the manifest injury of the plaintiffs in error, and that the judgment herein should be reversed.

CHAS. F. MUNDAY,
Attorney for Plaintiffs in Error.

NO. 1823

United States Circuit Court of Appeals

FOR THE NINTH JUDICIAL CIRCUIT.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE AND PETER JANSEN,
Plaintiffs in Error,

vs.

LESTER W. DAVID,
Defendant in Error.

Reply Brief of Plaintiffs in Error.

Upon Writ of Error from the United States Circuit Court for the Western District of Washington, Northern Division.

CHAS. F. MUNDAY,
Attorney for Plaintiffs in Error,
SEATTLE, WASHINGTON.

FILMER BROS. CO. PRINT, 330 JACKSON STREET, S. F., CAL.

NO. 1823

United States Circuit Court of Appeals

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vs.

LESTER W. DAVID,
Defendant in Error.

Reply Brief of Plaintiffs in Error.

Upon Writ of Error from the United States Circuit Court for the Western District of Washington, Northern Division.

CHAS. F. MUNDAY,
Attorney for Plaintiffs in Error,
SEATTLE, WASHINGTON.

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

No. 1823.

EDWARD F. SWIFT, ANDREW D. DAVIDSON, ALEXANDER D. McRAE and PETER JANSEN,

Plaintiffs in Error,

vs.

LESTER W. DAVID,

Defendant in Error.

Upon Writ of Error from the United States Circuit Court for the Western District of Washington, Northern Division.

Reply Brief of Plaintiffs in Error.

Plaintiffs in error respectfully call attention to the following errors in statements of facts occurring in the brief of defendants in error:

1. On page 2 it is stated in effect that the issues in this case were made up upon the filing of the reply, September 27, 1909.

A motion was made to strike from this reply (Transcript of Record, page 35), which motion was granted, October 16, 1909 (Transcript of Record, page 36). So that the case was not really at issue until that date.

2. On page 6 it is stated that "after the issues had been made up in this case the plaintiff (David) happened to visit Vancouver, B. C., and was there served with process in an action instituted there."

There is absolutely nothing in the record in this case to support this statement, and the same is untrue. Service was made on David in Vancouver long before issues were made up in this case. The action in the court at Vancouver, B. C., was begun before this action was begun. (Transcript of Record, pages 47 and 72.)

3. On pages 7 and 8, counsel for defendant in error undertakes to state the effect of the supersedeas bond given in the action in the court at Vancouver, B. C. The bond is set out at length in the supplemental answer (Transcript of Record, pages 52-78), and the legal effect of said bond under the law of British Columbia and the rules of practice and procedure of the Courts of British Columbia is set out in said supplemental answer. (Transcript of Record, pages 53-78.)

The action of the Circuit Court here complained of, being in effect the sustaining of a demurrer to the supplemental answer, these allegations for the purposes of this writ of error must be taken as true.

4. On page 8 it is stated that before the action was commenced in British Columbia, these plaintiffs in error had filed their counterclaim in this action.

This is untrue, and totally ignores the allegation of the supplemental answer that the action in British Columbia was commenced first.

5. On page 8 it is stated that the British Columbia court refused to stay proceedings in that court, after the issues in this case had been made up, and although that court knew of the pendency of the proceedings in the Circuit Court.

There is absolutely no justification for this statement. There is nothing whatever in the record here upon which to make such statement. Further statements along the same line are made on pages 8 and 9—all wholly unsupported by anything in the record.

6. The contention of defendant in error on pages 9, 14 and elsewhere in his brief, that plaintiffs in error are not prosecuting this writ of error in good faith, but wholly for delay, is a product of a too vivid imagination on the part of counsel for defendant in error, and is untrue in point of fact.

7. On page 11 it is stated that the sufficiency of the bond given by the Canadian Bank of Commerce was never submitted to Mr. David—that he had nothing to do with the approval of the bond, or anything to say as to the solvency of the surety or the conditions of the bond or security.

There is absolutely no basis in fact or in the record for any of these statements. The supplemental answer alleges specifically that the bond was given on the demand and requirement of David, and that the security was approved and accepted by David. The only conclusion anyone can arrive at, to the credit of counsel who wrote the brief for defendant in error, is that he failed to read the record in this case.

8. On pages 13 and 14, attention is particularly called by counsel for defendant in error to the fact that before the plaintiff was ever served with process in the Canadian court "this action * * * " was pending, "and the issues had been made up."

Again we must conclude that counsel for defendant in error never read the record in this case before

writing his brief, for there is nothing in the record to justify this statement.

9. Again, on page 14, it is stated that the transcript of the proceedings of the Canadian court as contained in the supplemental answer offered does not show any security given for that judgment that was ever approved by David.

This wholly ignores the positive allegation of the supplemental answer that the security was given on the demand and requirement of David, and was approved and accepted by him.

10. Defendant in error complains on page 15 that these plaintiffs in error dismissed their counterclaim in the Circuit Court, and in effect says that after withdrawing the counterclaim they went into the foreign jurisdiction and instituted proceedings there.

Again, the allegation of the supplemental answer, that the action was commenced in Vancouver before this action was begun is ignored. The plaintiffs in error had the undoubted right to dismiss their counterclaim. The proper place to try this case was in Vancouver. The whole subject matter was there. The stock, for the price of which David is suing, is there, in the Bank of Montreal, New Westminster, B. C. (see page 3 of Transcript of Record); the timber lands involved are all in British Columbia; the witnesses were all there—whether or not there was a shortage of timber had to be determined according to the laws and customs of British Columbia—the whole controversy was there. These plaintiffs in error brought their action there before they

were sued in the Circuit Court. It only *happened* that being temporarily in Washington they were served with process in this action.

Furthermore, attention is called to the fact that David voluntarily submitted his demand to the court in British Columbia by filing his counterclaim in that action, took his judgment there in that action, demanded and required that payment of that judgment should be secured there, and accepted and approved the security which he required these plaintiffs in error to give there.

Why should he be allowed to harass and vex these parties by further litigation at additional cost? For what good purpose can he call upon the courts of this jurisdiction, when upon his own voluntary act and demand he has already secured all that he can secure in this action? To all intents and purposes his judgment has been satisfied. Suppose, instead of giving a bond for supersedeas in the Vancouver court, these plaintiffs in error had paid into the registry of that court the amount of the judgment in cash, and then the court had impounded the cash pending the appeal; the judgment would have been satisfied. Yet that is exactly the legal effect of what was done; no possible change could be made in his judgment by the appeal. The only effect of the appeal was to postpone the day when he could draw down his money—just the same effect exactly as would have resulted had the cash been paid into court.

The case of *Lawrence vs. Remington*, 6 Bissell, 44, cited in the opening brief of plaintiffs in error, did not hold that the plea interposed was only a plea in

abatement, as counsel for defendant in error says on page 11 of his brief; but held the plea to be in bar. That case is exactly in point here, and goes further even than it is necessary for this court to go.

The cases by defendant in error are not at all in point. The question of the effect of a foreign judgment is not the question here, any more than it was in *Lawrence vs. Remington*, *supra*. The point we make is that the supplemental answer sets up facts which in legal effect amount to a plea not only of a foreign judgment, but of satisfaction thereof, and all the cases hold that to be a good plea in bar.

It is respectfully submitted that the judgment should be reversed.

CHAS. F. MUNDAY,
Attorney for Plaintiffs in Error.

No. 1829

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant, and Plaintiff in Error,

vs.

AH FOOK, CHIN KEE, AND GON QUAY,
Appellees, and Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Appeal from and Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

FILMER BROS. CO., PRINT, 330 Jackson St., S. F.

No. 1829

No. 1829

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant, and Plaintiff in Error,

vs.

AH FOOK, CHIN KEE, AND GON QUAY,
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FILMER BROS. CO., PRINT, 330 Jackson St., S. F.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Names and Addresses of Counsel.

ELMER E. TODD, Esq., United States District Attorney for Plaintiff,
Room 314 Federal Building, Seattle, Washington.

CHAS. T. HUTSON, Esq., Assistant United States District Attorney for Plaintiff,
Room 314 Federal Building, Seattle, Washington.

FRED H. LYSONS, Esq., Attorney for Defendant,
420-421 Bailey Building, Seattle, Washington.

WILL H. THOMPSON, Esq., Attorney for Chin Kee and Gon Quay, Bondsmen,
409 Colman Building, Seattle, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Indictment.

May Term, 1908.

The Grand Jurors of the United States, chosen, selected and sworn, in and for the Northern Division of the Western District of Washington, upon their oaths present:

That heretofore, to wit, on the 23d day of December, in the year of our Lord one thousand nine hundred and seven, one Ah Fook late of said Northern Division of the Western District of Washington, and within the jurisdiction of this Court, then and there fraudulently, wilfully, knowingly, unlawfully and feloniously did import, smuggle and clandestinely bring into the United States of America, from a foreign port and place, to wit, China, certain merchandise of foreign manufacture, to wit, one hundred yards of manufactured silk, the said silk then and there being subject to duty by law and the duty thereon not having been paid or secured to be paid to the United States, as aforesaid, without making any report to the Collector of Customs for the Dis-

trict of Puget Sound, or to any officer of the customs, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States of America.

COUNT II.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: On the 23d day of December, in the year of Our Lord One Thousand Nine Hundred and Seven, one Ah Fook, late of the said Northern Division of the Western District of Washington, did then and there knowingly, fraudulently, unlawfully, wilfully and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of certain merchandise of foreign manufacture, to wit, one hundred yards of manufactured silk, after the said manufactured silk had been smuggled and clandestinely brought into the United States without the duty thereon having been paid or secured to be paid to the United States, the said manufactured silk being then and there subject to duty by law; that the said manufactured silk, prior to the time when the said Ah Fook did receive, conceal, buy, sell and facilitate the transportation, concealment and sale thereof, as aforesaid, had been fraudulently, knowingly, wilfully, unlawfully and feloniously imported, smuggled and clandestinely brought into the United States of America, in the said District of Puget Sound, at the time aforesaid, from China, a foreign country by some person or persons unknown to the Grand Jurors, without the duty thereon having been paid or secured to be paid

to the United States, the said manufactured silk being then and there subject to duty by law, and without any report having been made to the Collector of Customs, or to any officer thereof for the District of Puget Sound, of the importation of said manufactured silk; he, the said Ah Fook, at the time he did receive, conceal, buy, sell, and facilitate the transportation, concealment and sale of said manufactured silk, well knowing that the same had been imported, as aforesaid, into the United States contrary to law, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

ELMER E. TODD,
United States Attorney.
FREDERIC G. DORETY,
Assistant United States Attorney.

_____,
Foreman of the Grand Jury.

Witnesses examined before Grand Jury:
W. F. DONLAN.
W. M. ZIMMERMAN.

[Endorsed]: Indictment for Violation Sec. 3082, Smuggling. A True Bill. Ben W. Barnes, Foreman Grand Jury.

Presented to the Court by the Foreman of the Grand Jury in open court, in the presence of the Grand Jury, and filed in the U. S. District Court, June 2, 1908. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Affidavit of Identity of Defendant.

United States of America,
State of Washington,
County of King,—ss.

Chin Kee, being first duly sworn, on his oath deposes and says: That he is one of the sureties on the bail bond of the defendant herein and is one of the petitioners herein for leave to withdraw from said bond.

That he has read the statutory declaration of Tse Foo Shang made under oath at Victoria, Hongkong, November 5, 1909, before H. L. Dennys, a Notary Public, and has examined the photograph thereto attached, purporting to be the photograph of Tse Kam Fook, known also as Tse A. Fook.

Affiant further says that during the lifetime of the said Tse Kam Fook, known also as Tse A. Fook, affiant was personally acquainted with him and recognizes the said photograph attached to said declaration as the photograph of the said Tse A. Fook.

Affiant further says that the said defendant signed as a seaman on said steamship "Shawmut" under the name of Tse Ah Fook, which fact has been heretofore verified by the Immigration officials at the port of Seattle.

Affiant further says that the said declaration has been received by him since the making and filing of affiant's former affidavit herein; the said declaration having been received by affiant at Seattle, on December 13, 1909.

CHIN KEE.

Subscribed and sworn to before me this 15th day of December, 1909.

[Seal] FRED H. LYSONS,
Notary Public in and for the State of Washington,
Residing at Seattle therein.

Service of copy hereof together with copy of declaration referred to therein admitted this 14th day of December, 1909.

ELMER E. TODD,
U. S. Attorney.

[Endorsed]: Affidavit of Identity of Defendant. Filed in the U. S. District Court, Western Dist. of Washington. Dec. 20, 1909. R. M. Hopkins, Clerk.

[Transcript of Proceedings Had Before the United States Commissioner.]

United States of America,
Western District of Washington,—ss.

UNITED STATES OF AMERICA

vs.

AH FOOK.

Charge. Violation Section 3082.

Before me, James Kiefer, a United States Commissioner, in and for the Western District of Washington, complaint and affidavit was made on this 23d day of December, 1907, charging in substance that on or about the 23d day of December, 1907, at Seattle, in said District, the defendant, Ah Fook, in violation of Section 3082, Revised Statutes of the United States, unlawfully brought into the United States goods of foreign growth and manufacture, to wit, silk manufactured in China of the value of about $100.00, on which the duty imposed by law was not paid, he, the said Ah Fook, well knowing said duty was due and unpaid.

December 23, 1907, issued warrant to C. B. Hopkins, United States Marshal, returnable before me.

December 23, 1907, warrant returned endorsed as follows: "Received this warrant on the 23d day of December, 1907, at Seattle, and executed the same by arresting the within named Ah Fook at Seattle, on the 23d day of December, 1907, and have his body now in Court as within I am commanded. C. B. Hopkins,

United States Marshal per Fred M. Lathe, Deputy. 23d day of December, 1907."

December 23, 1907, issued subpoena for the following witnesses on behalf of the U. S.: F. P. Loftus and William Donlan.

December 23, 1907, said subpoena was returned endorsed as follows: "Received this writ December 23, 1907, and on or before December 23, 1907, served the same on the within named F. P. Loftus and William Donlan. C. B. Hopkins, U. S. Marshal, by Fred M. Lathe, Deputy."

December 23, 1907, defendant was brought before me, the said Commissioner, at my office in the City of Seattle, in said District, by Fred M. Lathe, Deputy U. S. Marshal, and the complaint was then and there read and fully explained to the said defendant, who thereupon, for plea, said he is "not guilty" as charged in said complaint.

And thereupon, in preliminary trial to determine whether there exists probable ground to believe the defendant guilty as charged, the following witnesses were sworn and examined on the part of the plaintiff, F. P. Loftus and William Donlan.

And from the evidence it appearing to me, the Commissioner, that the laws of the United States have been violated, as charged in the complaint and that there is probable cause shown to believe the defendant guilty of the alleged offense, it was ordered that he give bond in the sum of seven hundred and fifty dollars ($750.00) for his appearance before the United States District Court in and for the Western District of Washington, to be held on the 1st Tuesday

in May, 1908, at Seattle, to answer said charge, and that in default of same he stand committed.

And the following witnesses were recognized to appear at said term of Court: F. P. Loftus and William Donlan.

And the defendant failing to give said bond, was committed to the jail of King County, Washington, there to remain until discharged by due course of law, as further evidenced by the return on said Mittimus, which is as follows: "Received this Mittimus with the within named prisoner, on the 23d day of December, A. D. 1907, and on the same day I committed said prisoner to the custody of the jail keeper named in said Mittimus, with whom I left at the same time a certified copy of this Mittimus. Dated December 23, 1907, C. B. Hopkins, U. S. Marshal, Western District of Washington. By Fred M. Lathe, Deputy."

December 31, 1907, the said defendant gave bond in the said sum of seven hundred fifty dollars ($750.00) for his appearance at the said time and place, with Chin Kee and Gon Quoy as sureties thereon.

Commissioner's fees, $10.70.

United States of America,
Western District of Washington,—ss.

I hereby certify that the foregoing is a true and correct transcript of all the proceedings had before me in the case of the United States vs. Ah Fook as the same appears upon my docket No. 5, at page 281.

Witness my hand and official seal at Seattle, in said District, this 6th day of January, 1908.

[Seal] JAMES KIEFER,
United States Commissioner.

[Affidavit of F. P. Loftus.]

Before James Kiefer, United States Commissioner, in and for the Western District of Washington.

UNITED STATES OF AMERICA

vs.

AH FOOK.

Violation of Section 3082.

United States of America,
Western District of Washington,—ss.

F. P. Loftus, being first duly sworn according to law, deposes and says:

That he is and was at all times hereinafter mentioned a duly appointed, qualified and acting inspector of customs of the United States, stationed at the port of Seattle; that at the port of Seattle, on the 23d day of December, 1907, in said District, one Ah Fook unlawfully, knowingly and feloniously imported and brought into the United States certain merchandise of foreign growth and manufacture, to wit, silk goods manufactured in China of the value of about $100.00, which were then and there subject to duty and upon which the duty had not been paid.

Affiant further says that the said Ah Fook did in the District aforesaid, on the 23d day of December, 1907, unlawfully and knowingly have in his possession and facilitate the sale, transportation and concealment of certain silks manufactured in China upon which the duty had not been paid, he, the said Ah Fook, then and there knowing the said merchan-

dise to have been imported contrary to law, and knowing that the duty had not been paid thereon.

F. P. LOFTUS.

Subscribed and sworn to before me this 23d day of December, 1907.

[Seal] JAMES KIEFER,
U. S. Commissioner.

[Warrant to Apprehend Ah Fook.]

The President of the United States of America, to the Marshal of the United States for the Western District of Washington and to his Deputies, or any or either of them:

WHEREAS, F. P. Loftus, has made complaint in writing under oath before me, the undersigned, a United States Commissioner for the Western District of Washington, charging that Ah Fook, late of ——— County, in the State of ———, did, on or about the 23d day of December, A. D. 1907, at Seattle, Washington, in said District, in violation of Section 3082 of the Revised Statutes of the United States, unlawfully import and bring into the United States goods of foreign growth and manufacture, to wit, silk of the value of $100.00, on which the duty had not been paid and on which he knew the duty had not been paid, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, in the name of the President of the United States of America, to apprehend the said Ah

Fook wherever found in your District, and bring his body forthwith before me or any other Commissioner having jurisdiction of said matter to answer the said complaint, that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 23d day of December, A. D. 1907.

[Seal] JAMES KIEFER,
United States Commissioner as aforesaid.

Endorsed on back:

RETURN.

Received this warrant on the 23d day of Dec. 1907, at Seattle, Wash., and executed the same by arresting the within named Ah Fook, at Seattle, Wash., on the 23d day of Dec., 1907, and have his body now in Court, as within I am commanded.

C. B. HOPKINS,
U. S. Marshal.
Per Fred M. Lathe,
Deputy.

23d day of Dec., 1907.

[Subpoena for Appearance of F. P. Loftus and William Donlan.]

United States of America,
Western District of Washington,—ss.

The President of the United States of America, to the Marshal of the Western District of Washington, Greeting:

You are hereby commanded to summon F. P. Loftus and Wm. Donlan, if they be found in your baili-

wick, to be and appear before me, James Kiefer, a United States Commissioner for the Western District of Washington, aforesaid, at my office, 527 Colman Bldg., on the 23d day of December, 1907, at 3:30 o'clock P. M., to give testimony, and the truth to say, in a cause pending before me, wherein the United States is complainant and Ah Fook defendant.

In behalf of the U. S. of America.

Hereof fail not, under the penalty of the law, and have you then and there this writ.

Given under my hand, this 23d day of December, A. D. 1907.

[Seal] JAMES KIEFER,
United States Commissioner as Aforesaid.

MARSHAL'S RETURN.
(On Original Writ Only.)

Received this writ Dec. 23, 1907, and on or before Dec. 23, 1907, served the same on the within-named F. P. Loftus and Wm. Donlan, by leaving a certified copy thereof with each of them personally; and on the within named ———, by leaving such copy at the usual place of residence of each of them.

The other person within named not found.

Marshal's fees and costs on this writ, $1.00.

C. B. HOPKINS,
U. S. Marshal.
By Fred M. Lathe,
Deputy.

[Mittimus.]

United States of America,
Western District of Washington,—ss.

The President of the United States of America, to the Marshal of the Western District of Washington, and to the Keeper of the Jail of King, in the State of Washington, Greeting:

WHEREAS, Ah Fook has been arrested upon the oath of F. P. Loftus for having, on or about the 23d day of December, 1907, in said District, in violation of section 3082 of the Revised Statutes of the United States, unlawfully brought into the U. S. goods of foreign growth and manufacture on which the duty was not paid.

And, after an examination being this day had by me, it appearing to me that said offense had been committed, and probable cause being shown to believe said Ah Fook committed said offense as charged, I have directed that said Ah Fook be held to bail in the sum of $750.00 to appear at the first day of the next term of the District Court of the United States for the Western District of Wash., at Seattle, and he having failed to give the required bail:

NOW THESE ARE, THEREFORE, in the name and by the authority aforesaid, to command you, the said Marshal, to commit the said Ah Fook to the custody of the keeper of said jail of King County and to leave with said jailer a certified copy of this writ; and to command you, the keeper of said jail of said county, to receive the said Ah Fook prisoner

of the United States of America, into your custody, in said jail, and him there safely to keep until he be discharged by due course of law.

IN WITNESS WHEREOF, I have hereto set my hand and seal at my office in said District, this 23d day of Dec., A. D. 1907.

[Seal] JAMES KIEFER,
United States Commissioner for said Western District of Washington.

RETURN.

(To be Made on the Original Writ Only.)

Received this Mittimus with the within-named prisoner, on the 23d day of Dec., A. D., 1907, and on the same day I committed the said prisoner to the custody of the jail keeper named in said Mittimus, with whom I left at the same time a certified copy of this Mittimus.

Dated Dec. 23, 1907.

C. B. HOPKINS,
United States Marshal, Western District of Washington.

By Fred M. Lathe,
Deputy.

[Recognizance.]

United States of America,
Western District of Washington,—ss.

BE IT REMEMBERED, that on this 31st day of December, A. D. 1907, before me, a United States Commissioner for the said Western District of Washington, personally came Ah Fook, Chin Kee, and Gon Quoy, and jointly and severally acknowl-

edged themselves to owe the United States of America the sum of seven hundred and fifty dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this Recognizance is such, that if the said Ah Fook shall personally appear before the District Court of the United States, in and for the District aforesaid, at Seattle, Wash., on the 5th day of the present or any future term thereof, and then and there to answer the charge of having, on or about the 23d day of December, A. D. 1907, within said District, in violation of section 3082 of the Revised Statutes of the United States, unlawfully brought into the United States goods of foreign growth and manufacture, to wit, about 100 yards of silk manufactured in China on which the duty imposed by law had not been paid, he, the said Ah Fook, well knowing the said duty had not been paid, and then and there abide the judgment of the said Court, and not depart without leave thereof, then this Recognizance to be void, otherwise to remain in full force and virtue.

AH FOOK.
CHIN KEE.
GON QUOY.

Taken and acknowledged before me on the day and year first above written.

[Seal] JAMES KIEFER,
United States Commissioner as Aforesaid.

United States of America,
Western District of Washington,—ss.

Chin Kee, Gon Quoy, a surety on the annexed recognizance being duly sworn, deposes and says that he resides at Seattle, Washington, in the County of King, in said District, that he is a freeholder in the county of King, that he is worth the sum of seven hundred and fifty dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of personal property in King County, Washington.

CHIN KEE,
GON QUOY,
220 Second, So.

(Affiant's signature) ————

Sworn to and subscribed before me, this 31st day of December, A. D. 1907.

JAMES KIEFER,
United States Commissioner as Aforesaid.

[Endorsed]: Charge Smuggling. Filed in the U. S. District Court, Western Dist. of Washington. Jan. 8, 1908. R. M. Hopkins, Clerk. A. N. Moore, Deputy. James Kiefer, U. S. Commissioner.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Order of Reference.

The above-named defendant, Ah Fook, having on this 16th day of February, 1909, been regularly called for arraignment under the indictment herein, and failing to respond to said call, and to appear in court, the United States Attorney moved that the bail of said defendant be declared forfeited to the United States, thereupon Fred H. Lysons, Attorney for said defendant Ah Fook, informed the Court that he had been advised that the defendant, Ah Fook, was dead, and that he would, therefore, move the Court for an order of reference to take testimony as to the death of the defendant, and the Court being fully advised in the premises;

It is ordered, that this cause be, and the same hereby is, referred to A. C. Bowman, Esq., United States Commissioner, to take the testimony offered in support of the allegation as to the death of the defendant, and report the same back to this Court.

Done this 22d day of March, 1909.

C. H. HANFORD,

Judge.

[Endorsed]: Order to Take Testimony. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 22, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Notice of Appearance [for Defendant].

To the Clerk of the Above Court:

Please enter my appearance as attorney for the defendant in the above-entitled cause with my consent hereby given that service of papers in said cause may be made upon me at my office, 420-421 Bailey Building, Seattle, Washington, in said District.

FRED H. LYSONS,
Attorney for Defendant.

[Endorsed]: Notice of Appearance. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 27, 1909. R. M. Hopkins, Clerk. W. D. Covington, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Motion [for Order to Speed the Cause].

Now comes Charles T. Hutson, Assistant United States Attorney for the Western District of Washington, and moves the Court for an order to speed the cause in the above-entitled matter. This motion is based on the files and records in this cause.

CHARLES T. HUTSON,
Assistant United States Attorney.

Received a copy of the within motion this 6th day of November, 1909.

FRED H. LYSONS,
Attorney for Defendant.

[Endorsed]: Motion. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 6, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Notice [of Motion for an Order to Speed the Cause.]

To Fred H. Lyons, Attorney for the Above-named Defendant:

You will please take notice that on Monday, the 15th day of November, 1909, at the hour of ten o'clock, A. M., or as soon thereafter as counsel can be heard, the plaintiff in the above-entitled cause will move the above-entitled court for an order to speed said cause.

Dated at Seattle, Washington, this 6th day of November, 1909.

ELMER E. TODD,
United States Attorney.
CHARLES T. HUTSON,
Assistant United States Attorney.

Received a copy of the within Notice this 6th day of November, 1909.

FRED H. LYSONS,
Attorney for Defendant.

[Endorsed]: Notice. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 6, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Notice of Hearing [of Petition of Chin Kee and Gon Quay to Withdraw from Bail Bond].

To Elmer E. Todd, United States Attorney, and Charles T. Hutson, Assistant United States Attorney:

Take notice that on Monday, the 22d day of November, 1909, at the hour of ten o'clock, A. M., or as soon thereafter as counsel can be heard, the petition of Chin Kee and Gon Quay for leave to withdraw from the bail bond of the defendant herein, will be brought on for hearing and argument in the above-entitled court.

Dated this 18th day of November, 1909.

WILL H. THOMPSON and
FRED H. LYSONS,
Attorneys for said Petitioners.

Service of copy hereof admitted this 19th day of November, 1909.

CHAS. T. HUTSON,
Assistant U. S. Attorney.

[Endorsed]: Notice of Hearing. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 19, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Petition to Withdraw from Bail Bond.

Come now Chin Kee and Gon Quay, and respectfully represent and show:

1. That they are the bondsmen on the bail bond herein of Ah Fook, the defendant.

2. That they have made every effort and endeavor to produce the said defendant, Ah Fook, in court to respond to his indictment herein and stand trial thereon, but have been unable so to do, and have been prevented from so doing by the acts of the Government of the United States, the plaintiff in this cause.

3. That your petitioners have been informed and they believe, and upon such information and belief allege the fact to be, that the defendant, Ah Fook, is now deceased.

That to substantiate the allegations of this petition your petitioners have filed herewith, and respectfully ask to have considered in connection with this petition, the affidavit of your petitioner, Chin Kee.

Wherefore, your petitioners respectfully pray that they may be permitted to withdraw from the said

bail bond herein of the defendant, Ah Fook, and that said bond be canceled and terminated as to them and each of them.

WILL H. THOMPSON and
FRED H. LYSONS,
Attorneys for Chin Kee and Gon Quay.

State of Washington,
County of King,—ss.

Chin Kee, being first duly sworn, on his oath deposes and says: That he is one of the petitioners named in the foregoing petition, and makes this verification for himself and on behalf of his copetitioner; that he has heard the same read, knows the contents thereof, and believes the same to be true.

CHIN KEE.

Subscribed and sworn to before me this 18th day of November, 1909.

[Seal] FRED H. LYSONS,
Notary Public in and for the State of Washington,
Residing at Seattle Therein.

Service of copy hereof admitted this 19th day of November, 1909.

CHAS. T. HUTSON,
Assistant U. S. Attorney.

[Endorsed]: Petition to Withdraw from Bail Bond. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 19, 1909. R. M. Hopkins, Clerk.

[Affidavit of Chin Kee.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

United States of America,
State of Washington,
County of King,—ss.

Chin Kee, being first duly sworn, on his oath deposes and says: That he is one of the Sureties on the bail bond of the defendant herein, Ah Fook; that at the time of the said defendant's arrest and of his hearing before the Commissioner of this Court, at which hearing he was bound over to appear before the United States Grand Jury, the said defendant was a seaman on the steamship "Shawmut," plying between the ports of Hongkong, China, and Seattle, Washington, he having signed the ship's articles as such, and being thereby legally and morally bound to continue in his said employment and return on said vessel upon its sailing from this port to said port of Hongkong; that with the consent of the United States Attorney of this District and the Government authorities that he might so continue in his said employment as such seaman, the

bond herein was given by this affiant and his co-bondsman to enable the said defendant to retain his liberty and to continue in his said employment.

That upon the return of said vessel to Hongkong, the said defendant, Ah Fook, was by the Master of said vessel, discharged, and his articles of employment cancelled and terminated, and the said vessel refused to return him to this port, either as a seaman or a passenger, or in any other capacity or at all; that thereupon the said defendant endeavored to secure return passage upon other vessels returning from said Hongkong and other ports of China to this port, but such passage was refused him by each of said vessels upon the ground, and for the reason that he could furnish no certificate or other evidence of his right to return to the United States; that the said defendant immediately advised your affiant of the said facts and of his said condition, and your affiant, accompanied by Ah Fook's attorney herein, Fred H. Lysons, said Fred H. Lysons acting also for your affiant and his co-bondsman herein, visited each of the several steamship offices in this city and the city of Tacoma, and endeavored to secure passage for the said Ah Fook from the said port of Hongkong, China, or any other port in China to the port of Seattle or to some port in the State of Washington; that your affiant offered to pay and tendered to each of said steamship companies the passenger fare for the said Ah Fook from any port in China to any port in the State of Washington, together with return fare from this country to China, in order to provide for his return passage after his

trial herein or after the termination of his imprisonment in case he should be convicted and sentenced to imprisonment upon his said trial; that each and all of said steamship companies refused said offer and refused to permit the said Ah Fook to embark upon any of their said vessels, either in the capacity of seaman, a passenger or in any other capacity or at all upon the ground, and for the reason that he had no right to admission to this country as a passenger and that they could make no business arrangement for his employment as a seaman for a single trip from a Chinese to an American port with the certainty or at least the probability that they would lose the benefit of his services on the return trip.

That your affiant together with said Fred H. Lysons continued and persisted in said negotiations with said steamship companies, and said negotiations, together with the negotiations of the said defendant in his effort to procure return passage to this country, consumed the whole of the spring and summer of the year 1908; that finally one of the said steamship companies consented to bring said Ah Fook to this country on condition that they be furnished through the immigration authorities with evidence of his right to land here, or with evidence as to such a status by him as would enable them to bring him here as a passenger and land him as such.

That thereupon your affiant with his said attorney took up negotiations with the United States Immigration authorities at this port for the purpose of securing to the defendant the right to return to

this country, and of assuring to said steamship companies their right to return him to this port; that the local immigration officials and authorities asserted that they had no authority themselves to comply with affiant's request or to insure said defendant's right of return, and upon their recommendation so to do, and upon their assurance that they would approve the request suggested to affiant that his said request be submitted to the head of the Department at Washington, D. C., namely the Hon. Secretary of Commerce and Labor; that thereupon and in compliance with said suggestion of said local immigration officials and in pursuance of his said effort to return the said defendant into Court to answer his indictment herein, your affiant's attorney in the month of October, 1908, addressed a letter to the Hon. Secretary of Commerce and Labor in which he laid before him fully and in detail, all of the facts necessitating the return of the defendant herein, and all of said circumstances which had theretofore and were then preventing his said return, and requesting the co-operation of the Department in the matter, and the consent of the officials to the said defendant's return, the following being a copy of said letter:

To the Hon. Secretary of Commerce and Labor, Washington, D. C.

Sir: At the May, 1908, Term of the United States District Court for the Western District of Washington, holding terms at Seattle, Mr. Ah Fook was indicted by the Grand Jury, charged with the crime of smuggling silks into this country. Ah Fook was

at the time employed as steward on the Steamship "Shawmut," plying between this port and China, and upon his indictment and arrest he was released on bond and resumed his said employment. This employment took him back to China on the Steamship and he was thereafter discharged by the company in Hongkong. He has been anxious ever since to return to this country and stand trial on his indictment but has been unable to do so for the reason that neither the "Shawmut" nor any other steamship will bring him here as a passenger for the reason that he has no return certificate nor any evidence showing his right to return to this country.

Ah Fook's bondsmen have taken the matter up with the local immigration officials and the United States Attorney and they express a willingness to co-operate with the bondsmen and with Ah Fook in enabling him to return here and in securing his return. I desire to ask you, therefore, whether you cannot instruct the local officials to endeavor to arrange with some steamship company to bring Ah Fook back as a passenger under proper safeguards. It has occurred to me also that you might be able to direct a co-operation of your officials at Hongkong.

Court convenes next month, so it is important that such action as may be had be taken promptly. I am addressing this communication to you at the suggestion of the local officials, both of the Department of Justice and of Immigration, who inform me that

they will willingly take any action authorized by you in the interest of securing Ah Fook's return.

Very respectfully,

FRED H. LYSONS.

That said letter, in compliance with and following the custom in regard thereto, was by affiant's said attorney, transmitted to the Hon. Secretary of Commerce and Labor through the local immigration office, and the same was by the Immigrant Inspector in Charge forwarded to the Hon. Secretary with his recommendation that the relief therein asked for be granted.

That the Hon. Secretary of Commerce and Labor responding through the local immigration office to your affiant's said communication and request, refused to permit the said defendant, Ah Fook, to return to this country and to be admitted hereto under his said indictment, or in compliance with and in exoneration of his said bond, and further, ruled, held and directed that in case he should return on any of said vessels as a seaman that he could be permitted to land for the purpose of trial and answering his indictment herein, only on condition that he gave and furnished the usual bond required of Chinese seamen, and further, that a bond should be given guaranteeing the return of the said Ah Fook to China at the termination of his trial or of his sentence, if convicted, such return to be without cost to the Government, the said ruling and holding of the said Hon. Secretary of Commerce and Labor and of the said Department, being communicated to affiant's said attorney by communication from the

local Immigration Inspector in Charge, of which the following is a copy:

November 6, 1908.

Fred H. Lysons,
Attorney at Law,
Seattle, Washington.

Sir: Referring to recent correspondence in the matter of the application of the bondsmen of one Ah Fook, a member of the crew of the S/S "Shawmut" December 14th last for permission to return to the United States in order to stand trial for smuggling silks, you are advised that we are in receipt of a communication from the Department in which it is held that Ah Fook may return to the United States only as a seaman, and if he should do so he may be permitted to land under bond as in the case of other Chinese seamen. The bondsmen interested in securing the attendance in Court should furnish such bond conditioned for his departure from the country at the termination of his trial or of his sentence, if convicted, without cost to the Government.

Respectfully,
JOHN H. SARGENT,
Inspector in Charge.
H. A. M.

K.

That by reason of the said facts and circumstances, your said bondsmen were by the act of the Government itself, prevented and precluded from returning or procuring the return of the said Defendant into this jurisdiction or to the United States, for

the purpose of answering and responding to his indictment herein.

That thereafter and at about the month of February, 1909, your affiant received information that the said Ah Fook had died shortly prior thereto, which information your affiant has every reason to believe is true; that it is the common report among and belief of the former friends and associates of the said Ah Fook that he is now dead, but your affiant has been unable up to this time to secure and submit to this Court competent, first-hand evidence thereof; that your affiant is and ever since receiving said report has been making every effort to learn the truth as to said report and has endeavored to arrange for a trip to China, or his co-bondsman for the purpose of investigating said report and procuring evidence in the matter, if the report is true; that business and family associations have prevented such a trip up to this time, but it is the purpose of your affiant and of his co-bondsman to send an agent or representative to Hongkong for the purpose of investigating the said report and of submitting to the Court evidence as to the truth or falsity thereof; that in view of the facts hereinbefore alleged that the return of the said Ah Fook was prevented during his lifetime by the Government itself and would now be so prevented were said Ah Fook still living, your affiant and his said co-bondsman have not felt it incumbent upon them to go to the trouble or incur the expense necessary to investigate the said report of Ah Fook's death, and establish the fact thereof, if it be true; that if in the opinion of the Court in view

of the acts, attitude and holdings of the Government through its Department of Commerce and Labor, as hereinbefore set forth, there exists any liability on said bond, your affiant would respectfully request that he be given further time in which to investigate the said report and belief that the said defendant is dead and submit evidence thereof to the Court.

[Seal] CHIN KEE.

Subscribed and sworn to before me this 18th day of November, 1909.

FRED H. LYSONS,
Notary Public in and for the State of Washington,
Residing at Seattle therein.

Service of copy hereof admitted this 19th day of November, 1909.

CHAS. T. HUTSON,
Asst. U. S. Attorney.

[Endorsed]: Affidavit of Chin Kee. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 19, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AH FOOK,
Defendant.

Affidavit of Elmer E. Todd.

The United States of America,
Western District of Washington,—ss.

Elmer E. Todd, being first duly sworn, on oath deposes and says, that he is now and ever since November 1, 1907, has been the United States Attorney for the Western District of Washington, that he has read the affidavit of Chin Kee filed in support of the sureties' petition to withdraw from bail bond in this cause; that neither the affiant nor any person from the United States Attorney's office was present at the preliminary hearing before James Kiefer, United States Commissioner, on December 23, 1907, at which the defendant was bound over to appear before the United States Grand Jury; that said cause was not called to the affiant's attention, or the attention of anyone in his office until after the defendant had been bound over to appear before the Grand Jury and had given bail; that neither the affiant nor anyone in his office knew that the defendant was to leave the jurisdiction of the Court or was to continue in the employment of the steamship "Shawmut" as a seaman, and neither the affiant nor anyone in his office consented that defendant leave the jurisdiction of the Court or continue as a seaman on the steamship "Shawmut."

ELMER E. TODD.

Subscribed and sworn to before me this 20th day of November, 1909.

[Seal] W. D. COVINGTON,
Deputy Clerk, U. S. Circuit Court, Western District of Washington.

Received a copy of the within affidavit this 20th day of November, 1909.

FRED H. LYSONS,
Attorney for Defendant.

[Endorsed]: Affidavit of Elmer E. Todd. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 20, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Order Releasing Bondsmen.

The petition of Chin Kee and Gon Quay, bondsmen for Ah Fook, defendant herein, to be permitted to withdraw from the bail bond in the above-entitled cause, coming regularly on for hearing in open Court the 20th day of December, 1909, the petitioners being represented by Will H. Thompson and Fred H. Lysons, their attorneys, and the United States being represented by Charles T. Hutson, Assistant

United States Attorney for the Western District of Washington, and the matter being fully presented to the Court upon the grounds set out in said petition, and the Court being fully advised in the premises said: The defendant is a Chinese seaman, a laborer, and, therefore, of that class of aliens absolutely prohibited from entering the United States, and could not lawfully be at large on bail; the bond was void ab initio;

It is, therefore, ordered, adjudged and decreed, that the above-named bondsmen of the defendant Ah Fook be, and they are hereby released from the bail bond of the defendant given in the above-entitled matter for the foregoing reasons and no other.

C. H. HANFORD,
Judge.

To the above order and all thereof the United States excepts, said exception being allowed.

C. H. HANFORD,
Judge.

[Endorsed]: Order Releasing Bondsmen. Filed Jan. 17, 1910. R. M. Hopkins, Clerk.

United States District Court for the Western District of Washington.

No. 3611.

UNITED STATES,
Plaintiff,

vs.

AH FOOK,
Defendant.

Praecipe [for Citation on Writ of Error].

To the Clerk of the Above-entitled Court:

You will please issue citation on writ of error and hand same to the U. S. Marshal for service.

CHARLES T. HUTSON,
Assistant United States Attorney.

[Endorsed]: Praecipe. For Process, etc. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 25, 1910. R. M. Hopkins, Clerk.

United States District Court for the Western District of Washington.

No. 3611.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AH FOOK,
Defendant.

Praecipe [for Citation on Appeal].

To the Clerk of the Above-entitled Court:

You will please issue citation on appeal in the above-entitled cause and hand same to the U S. Marshal for service.

CHARLES T. HUTSON,
Assistant United States Attorney.

[Endorsed]: Praecipe. For Process, etc. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 25, 1910. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Petition for Appeal and Order Allowing Appeal.

Comes now the United States of America, plaintiff in the above-entitled cause, by Elmer E. Todd, United States Attorney for the Western District of Washington, and Charles T. Hutson, Assistant United States Attorney for said District; and deeming itself aggrieved by the order and decree releasing the bondsmen in the above-entitled cause made and entered herein on the 20th day of December, 1909, hereby appeals from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that said appeal may be allowed, and that a transcript of the record and all proceedings and papers upon which said order and decree is made, duly authenticated, may be sent to said Circuit Court of Appeals.

Your petitioner further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he therefore prays that said appeal may be allowed without bond.

Dated at Seattle, Washington, this 25th day of February, 1910.

ELMER E. TODD,
United States Attorney for the Western District of Washington.

CHARLES T. HUTSON,
Assistant United States Attorney for the Western District of Washington.

It is ordered that the appeal from the order and decree releasing the bondmen in the above-entitled cause be allowed as prayed for in the foregoing petition.

It is further ordered that said appeal being prosecuted under the direction and authority of the Attorney General of the United States, the same be allowed without bond.

C. H. HANFORD,
United States District Judge.

Received a copy of the within Petition and Order this 25th day of February, 1910.

FRED H. LYSONS,
Attorney for Appellees.

[Endorsed]: Petition for Appeal and Order Allowing Appeal. Filed Feb. 25, 1910. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

Petition for Writ of Error [and Order Allowing Writ of Error, etc.].

Comes now the United States of America, plaintiff in the above-entitled cause, by Elmer E. Todd, United States Attorney for the Western District of Washington, and Charles T. Hutson, Assistant United States Attorney for said District, and says that on or about the 20th day of December, 1909, this Court entered an order and decree herein, wherein it held that the certain bail bond wherein Ah Fook, Defendant herein, is principal, and Chin Kee and Gon Quay are sureties, executed and filed in the above-entitled cause, was void ab initio, and ordering said bondsmen, Chin Kee and Gon Quay released therefrom for said reason; that in said order and decree and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice to this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in its behalf out of the United States Cir-

cuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of; that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals.

Your petitioner further shows that this writ of error is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he therefore prays that said writ of error may be allowed without a bond.

Dated at Seattle, Washington, this 25th day of February, 1910.

ELMER E. TODD,
United States Attorney.
CHARLES T. HUTSON,
Assistant United States Attorney.

It is ordered that the writ of error prayed for in the foregoing petition be allowed.

It is further ordered that said writ of error being prosecuted under the direction and authority of the Attorney General of the United States, the same be allowed without bond.

C. H. HANFORD,
United States District Judge.

[Endorsed]: Petition for Writ of Error. Filed Feby. 25, 1910. R. M. Hopkins, Clerk.

Received a copy of the within petition this 25th day of February, 1910.

FRED H. LYSONS,
Attorney for Respondents.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3611.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

AH FOOK, CHIN KEE and GON QUAY,
Defendants in Error.

Writ of Error [Copy].

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the order and decree of a plea which is in the said District Court before you, or some of you, between the United States of America, plaintiff in error, and Ah Fook, Chin Kee and Gon Quay, defendants in error, a manifest error hath appeared to the great damage of the said United States of America, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in its behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the court-

rooms of said court in the city of San Francisco, in the State of California, in said Circuit, on the 27th day of March, next, in the said Circuit Court of Appeals, to be then and there held that the record and proceeding aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct the error, what of right and according to the law and customs of the United States ought to be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 25th day of February, A. D. 1910.

C. H. HANFORD,
United States District Judge.

[Seal] Attest: R. M. HOPKINS,
Clerk of the District Court of the United States for the Western District of Washington.

[Endorsed]: Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 25, 1910. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AH FOOK,
Defendant.

Assignment of Errors.

Comes now the United States of America, plaintiff in the above-entitled cause, by Elmer E. Todd, United States Attorney for the Western District of Washington, and Charles T. Hutson, Assistant United States Attorney for said District, and says, that in the record and proceedings in the above-entitled matter and in the order and decree releasing the bondsmen in said matter, made and entered herein on the 20th day of December, 1909, there is manifest error in this, to wit:

I.

That the Court erred in holding that the bail bond executed by Ah Fook as principal, and Chin Kee and Gon Quay as sureties, and given and filed in the cause entitled, United States of America, plaintiff, vs. Ah Fook, defendant, was void ab initio.

II.

The Court erred in holding that Ah Fook, a Chinese seaman, was a member of a class absolutely prohibited from entering the United States and could not lawfully be at large on bail, and bail bond given by him in the United States was void ab initio.

III.

The Court erred in making and entering the order releasing the bondsmen, Chin Kee and Gon Quay, from the bail bond of the defendant, Ah Fook, in the above entitled matter.

Wherefore, said United States of America, plaintiff in the above-entitled cause, by Elmer E. Todd, United States Attorney for the Western District of

Washington, and Charles T. Hutson, Assistant United States Attorney for said District, prays that the order made herein releasing said bondsmen, Chin Kee and Gon Quay, from the bond of Ah Fook, be reversed, set aside and held for naught.

ELMER E. TODD,
United States Attorney.
CHARLES T. HUTSON,
Assistant United States Attorney.

Received a copy of the within Assignment of Errors this 25th day of February, 1910.

FRED. H. LYSONS,
Attorney for Appellees.

[Endorsed]: Assignment of Errors. Filed Feby. 25, 1910. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AH FOOK,
Defendant.

Order [Directing Transmission of Exhibit to Appellate Court].

Now, on this 2d day of March, 1910, upon application of the District Attorney, and for sufficient cause appearing, it is ordered that Defendant's Exhibit One, being Statutory Declaration of Tse Foo Shang,

filed and used upon the hearing in this cause, be by the clerk of this court forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, there to be inspected and considered, together with the transcript of record on appeal in this cause.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington. March 2, 1910. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AH FOOK,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the entire record in the above-entitled cause on appeal herein, and file same with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, on or before the return date herein.

ELMER E. TODD,
United States Attorney.
CHARLES T. HUTSON,
Assistant United States Attorney.

[Endorsed]: Praecipe for Transcript of Record. Filed Feb. 25, 1910. R. M. Hopkins, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3611.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

AH FOOK, CHIN KEE and GON QUAY,
Defendants in Error.

Citation [on Writ of Error (Copy)].

The President of the United States of America, To Ah Fook, Chin Kee and Gon Quay, and to William H. Thompson and Fred H. Lysons, Their Attorneys, Greeting:

You, and each of you, are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date hereof, to wit, on the 27th day of March, 1910, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff in error and Ah Fook, Chin Kee and Gon Quay are defendants in error, and show cause, if any there be, why the order and decree releasing the bondsmen of Ah Fook in said matter, as set out in said petition for a writ of

error, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 25th day of February, 1910.

[Seal] C. H. HANFORD,
United States District Judge for the Western District of Washington.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Ah Fook, Chin Kee and Gon Quay, by handing to and leaving a true and correct copy thereof with Fred H. Lysons, attorney for the within named Ah Fook, Chin Kee and Gon Quay, personally at Seattle, in said District on the 25th day of February, A. D. 1910.

Fees: $2.12.

Dated February 25, 1910.

C. B. HOPKINS,
U. S. Marshal.
By Fred M. Lathe,
Deputy.

[Endorsed]: Citation. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 25, 1910. R. M. Hopkins, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3611.

UNITED STATES OF AMERICA,
Appellant,

vs.

AH FOOK, CHIN KEE AND GON QUAY,
Appellees.

Citation [on Appeal (Copy)].

To Ah Fook, Chin Kee and Gon Quay, Appellees, and to William H. Thompson and Fred H. Lysons, their Attorney:

You, and each of you, are hereby cited to be and appear before the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at the city of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the United States District Court for the Western District of Washington, in a proceeding entitled, United States of America, plaintiff, vs. Ah Fook, defendant, No. 3611, and show cause, if any there be, why the order and decree releasing the bondsmen of Ah Fook heretofore entered in said United States District Court, in said appeal mentioned, should not be reversed and set aside and held for naught, and why speedy justice should not be done in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, and the

seal of said District Court, this 25th day of February, 1910.

[Seal] C. H. HANFORD,

United States District Judge for the Western District of Washington.

RETURN OF SERVICE ON WRIT.

United States of America,

Western District of Washington,—ss.

I hereby certify and return that I served the annexed citation on the therein named Ah Fook, Chin Kee and Gon Quay, by handing to and leaving a true and correct copy thereof, with Fred H. Lysons, attorney for the within named Ah Fook, Chin Kee and Gon Quay, personally at Seattle, in said District on the 25th day of February, A. D. 1910.

C. B. HOPKINS,
U. S. Marshal.
By Fred M. Lathe,
Deputy.

Dated February 25, 1910.

Fees: $2.12.

[Endorsed]: Citation. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 25, 1910. R. M. Hopkins, Clerk.

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

United States of America,
Western District of Washington,—ss.

I, R. M. Hopkins, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify that the foregoing fifty-seven (57) typewritten pages, numbered from 1 to 57, inclusive, to be a full, true and correct copy of the records and all proceedings in the above and foregoing entitled cause as is called for by the Praecipe of the United States Attorney for the Western District of Washington, Attorney for Plaintiff in Error and Appellant, as the same remains of record and on file in the office of the clerk of the said District Court, at Seattle, in said District, and that the same, together with Defendant's Exhibit No. One, separately certified and transmitted with this record, constitutes the transcript of the record on appeal from the Order and Judgment of the Dis-

trict Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Circuit and return to the annexed Writ of Error.

I further certify that I annex hereto and herewith transmit the original Writ of Error, Citation on Writ of Error and Citation on Appeal.

I further certify that the cost of preparing and certifying the foregoing record on appeal and return to Writ of Error is the sum of Twenty-nine and 90/100 ($29.90) Dollars, and that the same is chargeable to the United States and will be included in my quarterly account for fees for the quarter ending March 31, 1910, as a charge against the United States.

In witness whereof I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 15th day of March, 1910.

[Seal] R. M. HOPKINS,
Clerk of said District Court.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3611.

UNITED STATES OF AMERICA,
Appellant,

vs.

AH FOOK, CHIN KEE and GON QUAY,
Appellees.

Citation [on Appeal (Original).]

To Ah Fook, Chin Kee and Gon Quay, Appellees, and to William H. Thompson and Fred H. Lysons, their Attorney:

You, and each of you, are hereby cited to be and appear before the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at the city of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the United States District Court for the Western District of Washington, in a proceeding entitled, United States of America, plaintiff, vs. Ah Fook, defendant, No. 3611, and show cause, if any there be, why the order and decree releasing the bondsmen of Ah Fook heretofore entered in said United States District Court, in said appeal mentioned, should not be reversed and set aside and held for naught, and why speedy justice should not be done in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, and the seal of said District Court, this 25th day of February, 1910.

[Seal] C. H. HANFORD,

United States District Judge for the Western District of Washington.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Ah Fook, Chin

Kee and Gon Quay, by handing to and leaving a true and correct copy thereof with Fred H. Lysons, attorney for the within named Ah Fook, Chin Kee and Gon Quay personally at Seattle, in said District, on the 25th day of February, A. D. 1910.

C. B. HOPKINS,
U. S. Marshal.
By Fred M. Lathe,
Deputy.

Dated February 25, 1910.
Fees: $2.12.

[Endorsed]: Original. No. 3611. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Ah Fook, Chin Kee and Gon Quay, Appellees. Citation. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 25, 1910. R. M. Hopkins, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3611.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

AH FOOK, CHIN KEE, and GON QUAY,
Defendants in Error.

Writ of Error [Original].

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the order and decree of a plea which is in the said District court before you, or some of you, between the United States of America, plaintiff in error, and Ah Fook, Chin Kee and Gon Quay, defendants in error, a manifest error hath appeared to the great damage of the said United States of America, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in its behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the court rooms of said court in the city of San Francisco, in the State of California, in said circuit, on the 27th day of March, next, in the said Circuit Court of Appeals, to be then and there held that the record and proceeding aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct the error, what of right

and according to the law and customs of the United States ought to be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 25th day of February, A. D. 1910.

C. H. HANFORD,
United States District Judge.

[Seal] Attest: R. M. HOPKINS,
Clerk of the District Court of the United States for the Western District of Washington.

[Endorsed]: Original. No. 3611. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff in Error, vs. Ah Fook, Chin Kee and Gon Quay, *Plaintiff* in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 25, 1910. R. M. Hopkins, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3611.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

AH FOOK, CHIN KEE and GON QUAY,
Defendants in Error.

Citation [on Writ of Error (Original)].

The President of the United States of America to Ah Fook, Chin Kee and Gon Quay, and to William H. Thompson and Fred H. Lysons, their Attorneys, Greeting:

You, and each of you, are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date hereof, to wit, on the 27th day of March, 1910, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff in error and Ah Fook, Chin Kee and Gon Quay are defendants in error, and show cause, if any there be, why the order and decree releasing the bondsmen of Ah Fook in said matter, as set out in said petition for a writ of error, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 25th day of February, 1910.

[Seal] C. H. HANFORD,

United States District Judge for the Western District of Washington.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Ah Fook, Chin Kee and Gon Quay by handing to and leaving a true and correct copy thereof with Fred. H. Lysons, attorney for the within named Ah Fook, Chin Kee and Gon Quay, personally, at Seattle, in said District, on the 25th day of February, A. D. 1910.

C. B. HOPKINS,
U. S. Marshal.
By Fred M. Lathe,
Deputy.

Dated February 25, 1910.
Fees: $2.12.

[Endorsed]: Original. No. 3611. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff in Error, vs. Ah Fook, Chin Kee and Gon Quay, Defendants in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 25, 1910. R. M. Hopkins, Clerk.

[Endorsed]: No. 1829. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant and Plaintiff in Error, vs. Ah Fook, Chin Kee, and Gon Quay, Appellees and Defendants in Error. Transcript of Record. Upon Appeal from and Writ of Error to the United

States District Court for the Western District of Washington, Northern Division. Filed March 18, 1910. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

[Certificate of Clerk U. S. District Court to Defendant's Original Exhibit No. 1.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3611.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AH FOOK,

Defendant.

United States of America,
Western District of Washington,—ss.

I, R. M. Hopkins, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify that the hereto attached exhibit is the defendant's original Exhibit Number One, introduced and used upon the trial of this cause, which said exhibit I herewith transmit to the Circuit Court of Appeals for the Ninth Circuit, there to be inspected and considered, together with the transcript of the record on appeal and the return to Writ of Error certified of even date herewith. The said exhibit is forwarded to the Circuit Court of Appeals pursuant to the order of the Judge of the District Court so directing, a copy of which said order will

be found on page 45 of the certified record hereinabove referred to.

In witness whereof I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 15th day of March, 1910.

[Seal] R. M. HOPKINS,
Clerk of said District Court.

[Defendant's Original Exhibit No. 1.]

(Form No. 89.)

AMERICAN CONSULAR SERVICE.

I, STUART J. FULLER, Vice & Deputy Consul General of the United States of America at Hongkong, do hereby certify and make known to whom these presents may come that HENRY LARDNER DENNYS before whom the annexed STATUTORY DECLARATION hath been made is a NOTARY PUBLIC in and for the Colony of Hongkong, duly authorized to administer oaths and affirmations and to take declarations in lieu of oaths, and that I believe the deponent is worthy of credit and qualified to verify the annexed STATUTORY DECLARATION.

IN WITNESS WHEREOF I have hereunto set my hand and seal of office at Hongkong, aforesaid, this eighth day of November 1909.

[Seal] STUART J. FULLER,
Vice & Deputy Consul General of the United States of America.

[Notl. Fee No. 187.]

[American Consulate General. Nov. 8, 1909. Hongkong, China. American Consular Service—$2—Fee Stamp.]

[Hong Kong Stamp Duty—Three Dollars.]

I, TSE FOO SHANG (謝富生) of Victoria in the British Colony of Hongkong do solemnly and sincerely declare that:—

1. I have been residing in Hongkong for over thirty years and during that time I have been the keeper of an employment office supplying stewards, cooks, boys, firemen and divers to vessels trading to Hongkong.

2. My eldest son Tse Kam Fook (謝金福) also known as Tse A Fook (謝亞福) was employed upon the steamer "Shawmut" as a printer and for two or three years was on board the said steamer on her voyages between Hongkong aforesaid and Seattle in the United States of America.

3. I have been informed by a friend named Lum Tak Kun and I verily believe that my said son Tse Kam Fook otherwise Tse A Fook was arrested at Seattle aforesaid on or about the 23rd day of December, 1907, charged with smuggling goods into the United States without payment of the Customs duty and that my said son gave bail or security for his appearance to answer the said charge after he should have returned from Hongkong on the following voyage of the said steamer.

4. My said son arrived back in Hongkong on board of the said steamer on or about the 20th February, 1908, and as the steamer Shawmut was shortly afterwards sold he remained in Hongkong waiting for employment on board another steamer running to Seattle.

5. Upon the 30th October 1908 my said son was accidentally burnt by the explosion of a kerosene lamp and was taken to the Government Civil Hospital in Hongkong where he died on the morning of the 11th of November, 1908.

6. The death was duly reported to the Sanitary Department in Hongkong and an order for my son's burial was obtained from the Magistrate Mr. J. R. Wood, such order was numbered 3552 and he was buried at Ma Tau Wai in the said Colony of Hongkong on the said 11th day of November, 1908.

7. A photograph of my said son Tse Kam Fook otherwise Tse Fook is attached to this my declaration.

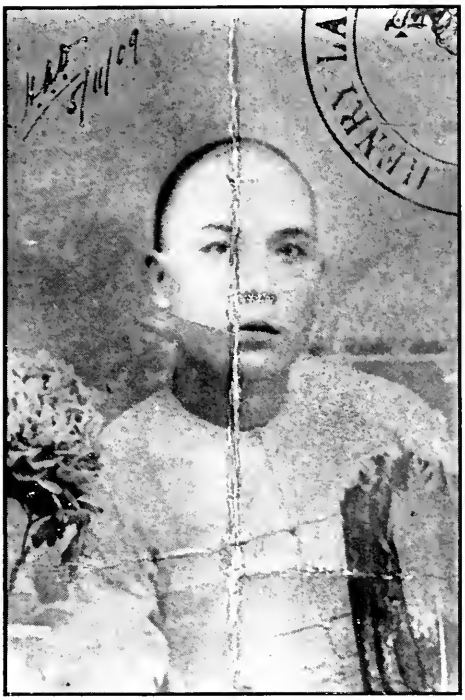
And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act, 1835.

DECLARED at Victoria Hongkong this 5th day of November, 1909, through the interpretation of Yam Kwan Yuen of Victoria aforesaid, Interpreter to Messrs. Dennys and Bowley, Solicitors, Hongkong, the said Yam Kwan Yuen having been also first declared that he had truly, distinctly and audibly interpreted the contents of this document to the declarant and that he would truly and faithfully interpret the declaration about to be administered to him.

Before me,

[Seal] H. L. DENNYS,
Noty. Pub.,
Hongkong.

(CK)



This is the photograph referred to in the annexed declaration of Tse Foo Shang made before me this fifth day of November, 1909.

[Seal] H. L. DENNYS,
Noty. Pub.,
Hongkong.

[Endorsed]: No. 3611. Defts. Ex. "1." Dated the 5th day of November, 1909. United States of America, Plaintiff, vs. Ah Fook, Defendant. Statutory Declaration of Tse Foo Shang. Filed in the U. S. District Court, Western Dist. of Washington. Dec. 20, 1909. R. M. Hopkins, Clerk. Dennys & Bowley, Solicitors, etc., Hongkong.

No. 1829. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants Exhibit "1." Received March 18, 1910. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant and Plaintiff in Error,* vs. AH FOOK, CHIN KEE, and GON QUAY, *Appellees and Defendants in Error.*	No. 1829.

Upon Appeal from and Writ of Error to the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLANT AND PLAINTIFF IN ERROR

ELMER E. TODD,
United States Attorney.
CHARLES T. HUTSON,
Assistant United States Attorney.

BROWN-DAVID PUBLISHING CO., 1912 SIXTH AVE.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant and Plaintiff in Error,* vs. AH FOOK, CHIN KEE, and GON QUAY, *Appellees and Defendants in Error.*	No. 1829.

Upon Appeal from and Writ of Error to the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLANT AND PLAINTIFF IN ERROR

STATEMENT OF FACTS.

Ah Fook, one of the appellees and defendants in error, was arrested at Seattle, Washington, on the 23d day of December, 1907, upon warrant issued by United States Commissioner James Kiefer, of Seattle (Record pp. 11-12). Said warrant was issued upon complaint of

F. P. Loftus, an Inspector of Customs, and charged that Ah Fook smuggled into the United States silk goods manufactured in China, of the value of $100, in violation of Section 3082 R. S. (Record pp. 10-11). Ah Fook appeared before said United States Commissioner on said 23d day of December, 1907, hearing was had, probable cause was shown, and Ah Fook was held to bail in the sum of $750 to appear at the first day of the next term of the District Court of the United States for the Western District of Washington, at Seattle. (Record pp. 8-9.) On December 31, 1907, Ah Fook entered into a recognizance in the said sum of $750, with Chin Kee and Gon Quay, the other appellees and defendants in error, as sureties, and was thereupon released by said United States Commissioner Kiefer. (Record pp. 15, 16, 17).

June 2, 1908, Ah Fook was indicted by the United States Grand Jury for the Western District of Washington, charged with the smuggling of the silk heretofore referred to. (Record pp. 2-4.) Thereafter on the 16th day of February, 1909, Ah Fook was regularly called to appear in the United States District Court for the Western District of Washington for arraignment. (Record p. 18.) He made no appearance except by attorney. The United States then moved, in open court, that the bail be forfeited to the United States. Thereupon Fred H. Lysons, attorney for Ah Fook, informed the court he had been advised that Ah Fook was dead, and requested that before acting upon the motion of the United States to forfeit the bail in said cause, the same be referred for the purpose of ascertaining whether or not Ah Fook was

dead. The court granted this request and the cause was referred to A. C. Bowman, United States Commissioner, Feb. 16, 1909. (Record P. 18.)

On the 17th day of February, 1909, testimony of one witness was offered before said Commissioner, but said testimony was never filed with the Clerk of the United States District Court for said district. Nothing further was done before said Commissioner.

Thereafter, in order to bring the matter to the attention of the court, notice and motion for an order to speed the cause was served and filed by the United States November 6, 1909 (Record pp. 20 and 21). Thereupon, on the 18th day of November, 1909, Chin Kee and Gon Quay, appellees and defendants in error, petitioned the District Court for permission to withdraw from said bail bond (Record pp. 23 and 24). The petition was supported by an affidavit of Chin Kee, setting out among other things that at the time of his arrest, and at the time the aforesaid bond was signed, Ah Fook was a seaman on the steamship Shawmut plying between the ports of Hong Kong, China, and Seattle, Washington (Record p. 25), and that Ah Fook left the jurisdiction of the District Court with the consent of the United States Attorney for the Western District of Washington (Record pp. 25 to 33). On November 20, 1909, Elmer E. Todd, United States Attorney for said District, served and filed an affidavit controverting the statement that Ah Fook left the jurisdiction of the District Court with the consent of the United States Attorney for the Western District of Washington (Record p. 34). The petition then came on

for hearing in open court, and on the 20th day of December, 1909, the District Court granted the petition of said Chin Kee and Gon Quay, stating:

"The defendant is a Chinese seaman, a laborer, and, therefore, of the class of aliens absolutely prohibited from entering the United States, and could not lawfully be at large on bail; the bond is void *ab initio;*"

and entered an order releasing said Chin Kee and Gon Quay as sureties upon the bond of Ah Fook (Record pp. 35, 36). From said order of release an appeal is taken, and a writ of error sued out.

ASSIGNMENT OF ERRORS.

The errors asigned will be considered under the following:

I.

Ah Fook, a Chinese, and a seaman, was not a laborer within the meaning of the Exclusion Laws, and, therefore, not a member of a class absolutely prohibited from entering the United States, and the District Court committed error in finding to the contrary.

II.

Ah Fook, a Chinese seaman, could properly be at large in the United States on bail, and the District Court committed error in finding to the contrary.

III.

Even if Ah Fook was not lawfully at large in the United States, the bail bond given by him in this case was

not void *ab initio*, and the District Court committed error in finding to the contrary.

IV.

That nothing appears in the record to justify the District Court in releasing the bondsmen, Chin Kee and Gon Quay, from the bail bond of Ah Fook, and the District Court committed error in releasing said bondsmen.

ARGUMENT.

I.

Ah Fook, though a Chinese and a seaman, was not a laborer within the meaning of the Chinese Exclusion laws, and, therefore, not a laborer of the class absolutely prohibited from entering the United States.

Article I. of the treaty between the United States and China, concerning immigrations, concluded November 17, 1880 (22 Stat. L. 826), is as follows:

"Whenever in the opinion of the Government of the United States the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse."

In accordance with the terms of said treaty an act known as "An Act to execute certain treaty stipulations relating to Chinese" was passed by Congress and approved May 6, 1882 (22 Stat. L. 58-59). The preamble and Section 1 thereof is as follows:

"Whereas, in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the expiration of ninety days next after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States."

This Act was amended and added to by the Acts of July 5, 1884 (23 Stat. L. 115) and September 13, 1888 (25 Stat. L. 476-477), and was continued in force for an additional period of ten years from May 5, 1892, by the Act of May 5, 1892 (27 Stat. L. 25), and was, with all laws on this matter in force on April 29, 1902, re-enacted without modification by the Act of April 29, 1902 (32 Stat. L. 176). The latter Act amended the Act of April 27, 1904 (33 Stat. L. 428).

Section 2 of the Act of July 5, 1884 (23 Stat. L. 115) is as follows:

"Sec. 2. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed

any Chinese laborer, from any foreign port or place, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every Chinese laborer so brought, and may also be imprisoned for a term not exceeding one year."

Section 8 of the Act of February 20, 1907 (34 Stat. L. 898) entitled "An Act to regulate the immigration of aliens into the United States" is as follows:

"Sec. 8. That any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or who shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter the United States shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment for each and every alien so landed or brought in or attempted to be landed or brought in."

Said Sections 2 and 8 are very similar. The latter Section was referred to and construed in

Taylor vs. United States, 207 U. S. 120; 52 L. Ed. 130.

The court there had under direct consideration Section 18 of said Act and said (speaking by Mr. Justice Holmes):

"The reasoning is not long. The phrase which qualifies the whole section is 'bringing an alien into the United States.' It is only 'such' officers of 'such' vessels that are punished. 'Bringing to the United States,' taken literally and nicely, means, as a *similar phrase in Sec. 8 plainly means,* transporting with intent to leave in the

United States and for the sake of transport—not transporting with intent to carry back, and merely as incident to employment on the instrument of transport."

This court in

Niven vs. United States, 169 Fed. 782,

decided May 3, 1909, in an opinion by Circuit Judge Ross, in what we submit was a stronger case on the facts supporting the Government's contention than the Taylor case, held that the Taylor case was conclusive of the Niven case, and that the Immigration Act of February 20, 1907, did not apply to alien seamen who were bona fide members of a ship's crew. By like reasoning the Chinese exclusion laws apply to laborers coming to the United States with the intent to remain in the United States, but not to Chinese seamen who are bona fide members of a ship's crew. Such has been the holding in several cases.

In re George Moncan, alias Ah Wah, 14 Fed. 44.

Moncan, alias Ah Wah, shipped as cook on the American ship "Patrician" at London, February 18, 1882. He was arrested later in Oregon and came before the court upon the charge of being unlawfully within the United States. The court said:

"This act was passed in pursuance with the treaty with China of November, 1880, supplementary to that of July 28, 1868. Pub. Treaties, 148. By the former the right, conceded to the Chinese by the latter to come to and reside within the United States at pleasure, was modified so as to authorize the government of the United States, whenever in its opinion 'the coming of Chinese *laborers* to the United States or residence therein affects

or threatens to affect the interests of the country, to regulate, limit, or suspend the same;' but such limitation or suspension shall be reasonable, and shall apply only *to Chinese who may go to the United States as laborers,* other classes not being included in the limitations. It is not to be presumed that Congress, in the passage of this Act intended to trench upon the treaty of 1868 as modified by that of 1880; and therefore it is that all general or ambiguous clauses or phrases contained in the former should be construed and applied so as to make them conform to the latter. It is manifest that the concession in the supplementary treaty of 1880 was only asked and obtained by the United States for the purpose of allowing it to limit or suspend the existing right of Chinese laborers to come and be within its territory, for the purpose of laboring therein, and thereby competing with the labor of its citizens for the local means of livelihood. . . .

". . . It is not to be supposed for a moment that Congress intended by the passage of this Act to impede or cripple this commerce by prohibiting, in effect, all vessels engaged in the carrying trade to and from the United States, and particularly those on the Pacific coast, from employing Chinese cooks, stewards, or crews, when, for any reason it is necessary or convenient to do so; for such would necessarily be the result of holding that the Chinese crew of a vessel coming from a foreign port to one of the United States are 'Laborers' within the meaning of the act. Such a 'limitation' upon the right of the Chinese to enter or be brought within our ports is clearly beyond the letter and spirit of the concession made by the supplemental treaty, which declares that it shall only apply 'to Chinese who may go to the United States as *laborers;*' that is, with the intention to labor here and enter into competition with the labor of the country. Upon this ground, also, it is clear to my mind that the Act does not apply to the crew of the Patrician. Of course, a Chinese seaman, although allowed to come into the ports of the United States as one of the crew of a vessel from a foreign port, does not thereby obtain the right to remain in the country and become a laborer therein; and if the

master allows him to go ashore permanently, the latter would be liable to removal, and the former to the punishment prescribed in Section 2 of the Act. But such seamen would have the same right to be on shore temporarily and not otherwise employed than in the business of the vessel during her stay in port, as those of other nationalities."

In re Ah Kee, 22 Fed. 519.

Ah Kee, a Chinaman, shipped at Calcutta as a seaman and arrived in New York, November 3, 1884, when the crew were discharged, the master intending to ship Ah Kee on board of some other vessel on a return voyage without landing. Ah Kee came on shore for some purpose and was thereupon arrested under the Act of July 5, 1884, and a writ of habeas corpus was sought. The court said:

"This case is, in most of its features, identical with that of *In re Moncan*, 14 Fed. Rep. 44. The persons were there released by Deady, J., because—*First,* 'they were simply on board of a vessel touching while on a voyage to a foreign port; *second*, they were here only as members of a crew of a vessel arriving in a foreign port, and taking on cargo for another,' with some further reasons in the *Case of Moncan.* See, also, *In re Ho King,* 14 Fed. Rep. 724. I concur entirely in the reasons and conclusions stated in the opinion of Deady, J., in that case. They seem to be decisive of this. The expressed object of the Act of May 6, 1882 (22 St. at Large, p. 58, c. 126) is to suspend for 10 years the coming of Chinese laborers to the United States. The title of the act is 'An Act to execute certain treaty stipulations relating to Chinese.' By Article I. of the treaty of 1880 (22 St. at Large, 826) it is provided that 'the limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other

classes not being included in the limitations.' The persons prohibited by the act from coming within the United States are throughout described by the phrase 'Chinese laborers.' The well-known use and meaning of this phrase, and contemporaneous history, leave no doubt in my mind that the words 'Chinese laborers' have no reference to seamen in the ordinary pursuit of their vocation on the high seas, who may touch upon our shores, and may land temporarily for the purpose only of obtaining a chance to ship for some other foreign voyage as soon as possible, and who do not intend to make any stay here, or enter upon any of the occupations on land within this country. Such persons do not come 'to the United States as laborers; *i. e.*, as laborers within the United States, in the sense of the act, and hence, 'are not included in the limitations.'

"Besides the general considerations above stated, there are particular provisions of the statute from which the exclusion of sailors, as being outside the intention of the statute, is to be inferred. By Section 8 the master of any vessel arriving in the United States from any foreign port is required 'to deliver and report to the collector of customs a separate list of all Chinese passengers taken on board his vessel at any foreign port or place, and all such passengers on board such vessel at that time,' with various particulars there specified. In this section the attention of the lawmakers was brought face to face with the persons who come to this country on board vessels. The law requires a detailed statement in regard to 'Chinese passengers,' and heavy forfeitures are denounced for violations of this section. But there is no requirement to specify any Chinese members of the crew. By Section 12 of the act any Chinese person found unlawfully within the United States 'shall be caused to be removed therefrom to the country from whence he came *at the cost of the United States*,' etc. It is credible that congress intended that a seamon found here, who has landed only to ship on a return voyage in the ordinary course of his vocation, which would involve no cost or trouble to the United States, should be arrested and sent

back at the cost of the government? Plainly, as it seems to me, seamen are neither within the spirit nor the letter of the act. The language of the act throughout has evidently in contemplation persons coming within the United States as laborers. It intends nothing beyond that. The limitation of the treaty is express that the restrictions shall only apply to Chinese who may come to the United States as laborers; that is, to be laborers within the United States. Chinese seamen, therefore, who only land temporarily in the ordinary pursuit of their calling, for the purpose of shipping on a return voyage as soon as possible, are, in my judgment wholly outside of the act."

In re Jam, 101 Fed. 989,

decided May 25, 1900. The court said:

"Under the treaty of 1894 and the Acts of 1888 and 1894, the exclusion is of 'Chinese laborers'; the class covered by the prior law is now enlarged, and the case of *In re Ah Kee* (D. C.) 22 Fed. 519, remains, therefore, applicable as before. The petitioner being a seaman is not within the purview of the acts so long as he merely touches here for no other purpose than to reship as soon as shipment can be obtained, and he is therefore discharged."

In Volume 24, Opinion of the Attorneys General, p. 111, the Attorney General of the United States on August 29, 1902, in answer to the following questions (page 112):

"Second. If such transfer could be made without the said crew being first duly signed for service on the *Korea* before a United States shipping commissioner at the port of San Francisco, would it not be a violation of the act of February 26, 1885 (23 Stat. 332), and the acts amendatory thereof, known as the 'alien contract labor laws'?

"Third. Would not the landing of the Chinese per-

sons constituting said crew, who now are merely passengers on a vessel of the said Occidental and Oriental Line, even temporarily for the purpose of the transfer above described, be in violation of the treaty and laws in relation to the exclusion of Chinese, since they are without the evidence prescribed for persons of that race of the classes excepted by Article III. of the convention of December 8, 1894, and without the certificates of registration and return required of Chinese laborers?''

said:

''2. Answering your second question, I am of opinion that the alien contract-labor laws have no application to Chinese or other foreign seamen. It can not be supposed that Congress, by the Act of February 26, 1885 (23 Stat. 332), and the acts amendatory thereof, intended to repeal the provision of the Act of June 26, 1884, before referred to. Had Congress so intended, its intention would have been clearly manifested, and not left to be gathered by implication from acts which have reference to entirely different subjects—the one relating to navigation and the other to the protection of labor within the United States.

''In the case of *United States ex rel. Anderson vs. Burke* (99 Fed. Rep. 895, 898), which involved the construction of the immigration laws, the Circuit Court for the Southern District of Alabama, after observing that all laws should receive a reasonable construction, and that 'a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers,' said:

'A consideration of the whole legislation on the subject of alien immigration, of the circumstances surrounding its enactment, and the unjust results which would follow from giving such a meaning to it as here claimed for it, makes it unreasonable to believe that Congress intended to include a case like the present one. My opinion is that these statutes do not contemplate the exclusion of the crews of vessels which lawfully trade to our ports, and that they do not, in spirit or in letter, apply to seamen

engaged in their calling, whose home is at sea; who are here today and gone tomorrow; who come on a vessel into the United States with no purpose to reside therein, but with the intention, when they come, of leaving again on that or some other vessel for the port of shipment or some other foreign port in the course of her trade. To hold that these statutes apply to aliens comprising the bona fide crews of vessels engaged in commerce between the United States and foreign countries would lead to great injustice to such vessels, oppression to their crews, and serious consequences to commerce.' (See also 23 Opin. 521)''

and then quotes fully from:

In re Moncan, supra;
In re Ah Kee, supra;
In re Jam, supra,

and agrees with the opinions therein rendered.

From the foregoing we submit that Ah Fook, being a bona fide seaman on board the American steamship ''Shawmut'' plying between the ports of Hong Kong, China, and Seattle, Washington, was not a laborer within the meaning of the Chinese exclusion laws, and was, therefore, entitled to be at large within the United States while the Shawmut was in port, or if his employment on the Shawmut terminated, was entitled to remain on shore until such time as he could secure other similar employment.

The United States recognizes that the exclusion law does not apply to Chinese seamen while actually engaged in that occupation. The Secretary of the Department of Commerce and Labor in the regulations governing the

admission of Chinese, approved February 26, 1907, issued the following rule:

"RULE 32. To prevent violations of law by Chinese seamen discharged or granted shore leave at ports of the United States, bond with approved security in the penalty of $500 for each such seaman shall be exacted for his departure from and out of the United States within thirty days."

It will be thus seen that not only does the United States recognize that the exclusion laws do not apply to Chinese seamen, but arranges for such seamen to land by giving security.

The only statute denying bail to Chinese persons is Section 5 of the Act of May 5, 1892 (27 Stat. Large, 25), which is as follows:

"Sec. 5. That after the passage of this Act, on an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay."

This section has no application to the present case as it refers only to persons seeking admission into the United States.

II.

No one would contend that if a Chinese seaman, within the United States by reason of the coming to the United States of the vessel upon which he was employed, committed a crime punishable by the laws of the United States, he could not be arrested and prosecuted. He

would be treated just the same as any other person, alien or citizen, who commits a crime within the United States, and if the crime committed by him is one in which bail is allowed, he could claim it as a right. Ah Fook was charged with a violation of Section 3082 of the Revised Statutes of the United States, which is as follows (Vol. 2 Fed. Stat. Ann., p. 748):

"*(Concealing or buying goods liable to seizure.)* If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

Section 1015 of the Revised Statutes of the United States (Vol. 1 Fed. Stat. Ann., p. 521), provides:

"*(Bail shall be admitted in cases not capital; by whom.)* Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders."

In *U. S. v. Louis*, 149 Fed. 277,

The court said:

"It is clear that section 1015 authorizes the admis-

sion to bail at any stage of the proceeding—before the hearing, or after; before the indictment, or after; before conviction, or after; and, of course, pending an appeal."

The foregoing shows conclusively that a person within the United States who commits an act in violation of Section 3082 would be entitled to give bail. We submit that this should apply as well to a *bona fide* Chinese seaman within this country as to any other person.

III.

Even if Ah Fook was not entitled to be at large in the United States on bail, yet if admitted to bail, such bail would not be void *ab initio*.

Some courts have held that where a complaint or indictment did not state a crime, still if the Commissioner had authority to inquire into the matter, bail given in such a case would be enforceable. In

Hardy vs. United States (Circuit Court of Appeals, Eighth Circuit), 71 Fed. 158.

the court said:

"The principal in the bail bond which the Government now seeks to enforce was arrested, and brought before a United States Commissioner who unquestionably had jurisdiction to inquire and to decide whether there was probable cause to believe that the accused had committed an offense against the laws which were then in force in the Indian Territory. The jurisdiction so vested in the officer necessarily made it his duty, and conferred upon him the power, to decide in the first instance, whether the acts charged in the information constituted an offense against the laws of the territory. And

inasmuch as he had jurisdiction to decide that question, and to require the accused to give bail for his appearance before the proper court, if he found it probable that an offense had been committed, it follows that the bail bond was not void, even though the information charged no offense, and even though the decision of the officer on that point was erroneous. When an examining magistrate acts within his jurisdiction, an order made, requiring the accused to give bail and a bail bond taken in pursuance of such order, are not void, although the magistrate may have erred in his judgment both as to matters of law and fact. *U. S. vs. Reese,* 4 Sawy., 629, 635, Fed. Cases No. 16,138. It very frequently happens that an information lodged with an examining magistrate is so defectively drawn that it states no offense, but it cannot be conceded that a recognizance taken or a bail bond given to secure the appearance of the accused before the proper court is for that reason void, when it is taken before an officer who has a general power to inquire into the commission of offenses, and to hold persons to bail. On the contrary, the law is well settled that in a proceeding by *scire facias* to enforce, as against a surety, a forfeited recognizance or bail bond that was taken before a court or examining magistrate, it is ordinarily no defense that the information or indictment under which the accused was arrested is defective in matter of averment, or that it describes no offense. *U. S. vs. Reese, supra; U. S. vs. Evans,* 2 Fed. 147; *U. S. vs. Stien,* 13 Blatchf. 127, Fed. Cas. No. 16,403; *State vs. Poston,* 63 Mo. 521; *State vs. Livingston,* 117 Mo. 627, 23 S. W. 766; *Reese vs. State,* 34 Ark. 610; *Com. vs. Skeggs,* 3 Bush, 19; *Friedline vs. State,* 93 Ind. 366; *Champlain vs. People,* 2 N. Y. 82."

In *Hunt vs. United States* (Circuit Court of Appeals, Eighth Circuit), 61 Fed. 795,

the court said:

"Assuming for the purpose of this decision, that the

recognizance in question was in legal effect taken by the Clerk of the district court, and that there was no statute, state or federal, then in force authorizing the clerk to take bail in criminal cases, the question arises whether, under the facts aforesaid, either the accused or his sureties can be heard to allege that the recognizance is void because it was not taken by the proper officer. In the case of *Jones vs. Gordon*, 82 Ga. 570, 9. S. E. 782, the accused was arrested in a county different from that in which the offense was committed, and was taken before a justice of the peace for the county where the arrest was made, who had no jurisdiction of the case and no authority to take bail therein. Before such justice the accused gave bail, with sureties, for his appearance before the Superior Court of the county where the offense was committed. It was conceded that the magistrate before whom the proceedings were had had no jurisdiction of the case, or authority to take bail. Nevertheless, it was held that as the recognizance was given voluntarily, and was effectual to secure the prisoner's release from imprisonment, it was supported by a sufficient consideration, and might be enforced against the sureties. The court said in substance, that the accused had the right to waive a legal trial, and the right to waive the disqualification of the justice to take bail, and that he had done so in effect by giving bail for his appearance before a court that had jurisdiction of the offense. In the case of *Weldon v. Colquitt*, 62 Ga. 449, where a person who had been arrested on Sunday insisted upon an immediate hearing before a magistrate on that day, and was held to bail, and forthwith entered into a recognizance, and by that means secured his release from arrest, it was held that the recognizance might be enforced by a writ of *scire facias*, although it was executed on Sunday, and although the magistrate had no right to conduct an examination on that day, and although his order of commitment was for that reason void. So in the case of *Littleton v. State*, 45 Ark. 413, it was held that a recognizance might be enforced against the sureties therein, although the sheriff before whom it was taken had no authority to execute

it. It is also a well established doctrine that where a bond is given in the course of a judicial proceeding, such as a bond to secure the release of attached property, or a forthcoming bond, the sureties are estopped by the execution of the obligation from afterwards asserting that no levy had been made, or that the property was not subject to attachment, or that the bond was invalid for other reasons of a like character. *Haggart v. Morgan,* 5 N. Y. 422; *Portis v. Parker,* 58 Am. Dec. 95; *Kincannon v. Carroll,* 30 Am. Dec. 391; *Bostwick v. Goetzel,* 57 N. Y. 584. See, also. *U. S. vs. Wallace,* 46 Fed. 569. We think that the principle maintained by the foregoing cases is sound, and should be applied in the case at bar. We can conceive of no sufficient reason why the sureties should be permitted to question the validity of the recognizance on the ground that it was acknowledged before the clerk, when it was so acknowledged at the request of the accused, and for the purpose of securing his immediate release, and when it was effectual for that purpose. We know of no reason why it was not competent for the accused to waive the formality of an acknowledgment of the bond and an examination of the sureties before the district judge; and having obtained his discharge by means of such a waiver, we know of no reason why he and his sureties should not be estopped from questioning the validity of the bond on that ground. In our judgment, the case is one in which the wholesome doctrine of estoppel may be properly invoked and applied."

It is not unusual for the Department of Justice to proceed against a person held in custody of the Bureau of Immigration, Department of Commerce and Labor of the United States as an alien unlawfully within the United States, and charge that person with the commission of some crime, arrest him, take him before a United

States Commissioner and fix his bail, and in the event of his inability to give bail, to commit him to jail. However, if he gives bail as required, he is released by the Commissioner. If after such release the Department of Commerce and Labor again desires to pick him up on its charge it can do so. If not, it can permit him to remain at large. In either event we submit it makes no difference as far as the validity of the bond given the commissioner is concerned. In fact, it very often happens that an alien who is thus charged by the Department of Commerce and Labor, and also prosecuted by the Department of Justice, is released on two bonds, one given to the Department of Commerce and Labor and the other to the Department of Justice, the validity of the one bond being in no wise affected by the other bond given by the same person. In this case, a proper complaint was lodged with United States Commissioner Kiefer, charging Ah Fook with smuggling. Ah Fook was brought before the Commissioner. It was a case in which the Commissioner had power to inquire as to the facts, and did so, and then bound Ah Fook over to the next grand jury, and fixed his bail at $750.00. Thereupon Ah Fook and his sureties gave bond in this sum, and secured his release from that particular charge. The fact that Ah Fook may have been unlawfully in the country in no way affects the validity of this bond. It is purely a collateral matter. If he was unlawfully in the country the proper officers of the Department of Commerce and Labor could pick him up and proceed against him on that

charge, but we submit that that should in no way affect the validity of the bond in question.

IV.

The claim of the bondsmen that Ah Fook was dead at the time he was called for arraignment is supported by no evidence other than that of *ex parte* affidavits. These affidavits wholly fail to prove the fact of his death, and the lower court did not find that there was any evidence of his death, but simply held that the Commissioner had no authority of law to accept bail because the defendant was a Chinese seaman, a laborer, and absolutely prohibited from entering the United States, the bond was void *ab initio*.

The other claim of the appellees is that the United States, by its officers, prevented his return. There is no evidence that he ever attempted to return to the United States, or that he could not have returned to the United States to stand trial if he so desired. The record (page 31) shows that the Inspector in Charge wrote a letter to the attorney of the defendant advising him that Ah Fook might return to the United States as a seaman, and be permitted to land under bond as in the case of other seamen. This was never done. The defendant gave a bond to appeal for trial, and failed to appear. If he was prevented from returning to the United States to appear for trial, it was only by virtue of the laws which were in force at the time he entered into the bail bond, and that would be no ground for relieving the bondsmen from the liability under the bond.

We respectfully ask that the judgment of the District Court be reversed.

ELMER E. TODD,
United States Attorney.
CHARLES T. HUTSON,
Assistant United States Attorney.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant and Plaintiff in Error,
vs
AH FOOK, CHIN KEE and GON QUAY,
Appellees and Defendants in Error.

No. 1829

UPON APPEAL FROM AND WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Appellees and Defendants in Error

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FRED. H. LYSONS and
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Attorneys for Appellees and Defendants in Error.

PRESS OF PLINY L. ALLEN

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STATEMENT OF FACTS.

The defendant, Ah Fook, was a seaman on board the Steamship "Shawmut," plying between the ports of Hong Kong, China, and Seattle, Washington, and while said vessel was in the latter port on December

23, 1907, he was arrested upon a warrant issued by United States Commissioner James Kiefer upon a complaint charging the crime of smuggling into the United States silk goods of Chinese manufacture. (Record pp. 10-11, 25.) Upon the hearing before the Commissioner, the defendant was held to bail in the sum of seven hundred-fifty dollars to appear at the next term of the District Court of the United States for that District, and on December 31, 1907, recognizance was entered into in said amount by said defendant Ah Fook, with Chin Kee and Gon Quay, the other appellees and defendants in error as sureties. (Record pp. 7-9, 15-17.)

Thereupon the defendant, Ah Fook, was released and resumed his place as seaman on the "Shawmut" for the return voyage to Hong Kong. (Record pp. 25-26.) Upon the arrival of the vessel at Hong Kong the master of the vessel discharged the defendant, and canceled his articles of employment and refused to return him to the port of Seattle either as a seaman or a passenger. (Record p. 26.)

Thereupon the sureties on his bond (the appellees and defendants in error, Chin Kee and Gon Quay), set about to bring defendant, Ah Fook, into court in compliance with the terms of their recog-

nizance. Their efforts in this direction developed the fact that none of the steamship companies operating between the port of Hong Kong and any of the ports of Puget Sound would bring Ah Fook as a seaman for the reason that the proceedings in this case would in all probability lose to them the benefit of his services on the return voyage, and refused to bring him as a passenger for the reason that he could furnish no certificate or other evidence customarily required in such cases of his right of admission to this country, or to land here. One company did agree, however, to bring him to the port of Seattle as a passenger on condition that arrangements be made with the Immigration authorities which would enable them to land him at that port.

The bondsmen took the subject up with the Immigration Department and acting upon the suggestion of the Inspector in Charge of the Immigration office at Seattle, caused their attorney to write to the Honorable Secretary of Commerce and Labor detailing the circumstances of the case and asking that arrangements be made to permit the landing of Ah Fook as a passenger on one of said vessels. This the Immigration Department refused unless the bondsmen would comply with four conditions then

and there imposed by the Department, viz.: (1) That Ah Fook be returned as a seaman only, (2) that he furnish a seaman's bond before being permitted to land, (3) that they furnish a bond conditioned for his departure from this country at the termination of his sentence, if convicted, and (4) that such departure be without cost to the government.

This order of the Department was transmitted to the bondsmen and their attorney in the following communication:

Seattle, November 6, 1908.

Fred H. Lysons,
Attorney at Law,
Seattle, Washington.

Sir: Referring to recent correspondence in the matter of the application of the bondsmen of one Ah Fook, a member of the crew of the S. S. "Shawmut" December 14th last for permission to return to the United States in order to stand trial for smuggling silks, you are advised that we are in receipt of a communication from the Department in which it is held that Ah Fook may return to the United States only as a seaman, and if he should do so he may be permitted to land under bond as in the case of other Chinese seamen. The bondsmen interested in securing the attendance in Court should furnish such bond conditioned for his departure from the country at the termination of his trial or of his sentence, if convicted, without cost to the Government.

Respectfully,
JOHN H. SARGENT,
Inspector in Charge.
H. A. M.

The bondsmen thereupon went into Court by motion to be released and be allowed to withdraw from the bond, upon the ground and for the reason that they had been prevented and precluded by the act of the government itself from returning the defendant Ah Fook into Court to answer his indictment; and information having in the meantime reached them that Ah Fook had died in China, that ground and reason was also included in the motion. (Record pp. 23-33.)

On the latter point a reference was had by direction of Judge Hanford for the purpose of taking testimony, and the testimony of one witness was had and on the argument of the motion both the United States attorney and the attorneys for the bondsmen assumed that this testimony had been returned into Court and filed, but it seems that through an omission of the Commissioner it had not been; so that the only evidence before the Court on that point was the declaration of Ah Fook's father (Record pp. 60-64), and the affidavit of identity of the photograph affixed thereto. (Record pp. 5-6.)

On the hearing on the motion, Judge Hanford took the view that under the law the defendant Ah

Fook was not entitled to be released on bail pending the investigation of the charge against him by the Grand Jury, and that the bond was therefore void *ab initio,* and in making the order releasing the bondsmen he based it on that ground (Record pp. 35-36), and refused to pass upon the other grounds, though specially requested at the time by the attorneys for said bondsmen, so to do.

ARGUMENT.

1. Bond Void *Ab Initio.*

The appellees, Chin Kee and Gon Quay, respectfully insist that the decision of the United States District Court for the Western District of Washington, Northern Division, was correct and in no wise erroneous, as insisted upon by the Government.

The defendant, Ah Fook, had been a Chinese sailor upon the ship "Shawmut;" had reached the port of Seattle in the United States; was there arrested, not as a sailor, not as a laborer, not as a Chinese person improperly within the United States, but as a smuggler, having committed a crime against the laws of the United States justifying his indictment, trial and punishment. From the mo-

ment he was thus seized by the Government, forcibly taken from the ship, and from his employment therein, and held by the Government as his custodian, he ceased to be a sailor performing the duties as such and entitled to any special protection as such; he could not be claimed by his employer nor could he demand to be delivered into the ship that he might aid his employer in any traffic upon the high seas.

The theory of the law in permitting temporary residence and freedom within the United States of Chinese sailors is not that a person who happens to be a sailor is entitled to any more indulgence than any other Chinese laborer, but that as a question of policy the actual operation of ships upon the high seas and the commerce of nations borne by such ships, would be entangled, interfered with and impaired by the undue restriction of action upon the part of Chinese sailors at ports visited by such ships; that, in other words, such sailors are allowed temporary privileges of liberty upon shore when awaiting the time for sailing of ships when they are employed in passing from ports of the United States to ports of other countries, or to take service upon other ships leaving the country. The authorities cited by the appellant all confirm this theory, and they are not in

point in the controversy that was presented for solution by the District Court.

But whether Ah Fook was a seaman, as contended by the Government, or not, he was released without authority of law, and the bond taken was null and void, as held by the learned trial Judge. If he were not a seaman he was a laborer without any right to remain in this country and therefore not entitled to his liberty under this or any other bond. If he were a seaman he could be liberated only under the provisions of Rule 7 of the regulations governing the admission of Chinese, which is as follows:

To prevent violations of law by Chinese seamen discharged or granted shore leave at ports of the United States, bond with approved security in the penalty of $500 for each such seaman shall be exacted for his departure from and out of the United States within thirty days.

If such a bond had been required of the defendant, Ah Fook, at the time he was released from prison, one of two things would have happened to the benefit of these sureties: either Ah Fook would have been unable to execute any such bond and, therefore, would have been required to remain in the United

States in custody, or he would have been deported by the Government, and therefore, the bond executed by these sureties would have been rendered null and void. If he had remained in the United States in custody he could and would have attended his trial, and these sureties would have been relieved from responsibility. In either event the sureties, the appellees, would have been saved harmless.

But Ah Fook was not in service as a sailor; he had been in service, and such service was terminated by the action of the Government in arresting and imprisoning him upon a criminal charge. Had he not given the bond in controversy he would have been compelled to remain in jail constrained and held by the Government itself to await his trial, however distant the date thereof, and the ship upon which he had formerly had employment might have passed from port to port and voyage to voyage, his place being filled by some other seaman, and it could not have been contended that he was all the while thus imprisoned acting as a sailor upon the steamer "Shawmut," nor could it have been claimed that he was passing through the United States, or any portion thereof, for the purpose of taking his place as

a seaman upon some other vessel; nor could it, in good faith, have been contended that while so imprisoned, the rights of navigators and of commerce upon the high seas were being interfered with, because, forsooth, it should be claimed that he was a sailor upon the steamer "Shawmut." Therefore, when he tendered a bond to the United States, asking to be discharged from restraint and imprisonment pending his trial, it was known by the Government that his status was not that of any one of the classes of Chinese exempt from deportation from the United States; that he could not remain indefinitely awaiting the disposition of the charge against him. An existing law which was violated every moment by his remaining, was a positive deprivation of the seaman's right to remain; he could not truthfully say that he was remaining temporarily in order to obtain employment as a seaman; if he remained he was remaining in good faith to abide the order of the Court, no matter how long delayed, in the disposal of the charge against him. But the law forbade him to remain, and in view of that law the Government had no right whatever to accept the bond, and the bond was, as the learned District Court announced, void *ab initio*.

Again, the act of the Government in releasing Ah Fook, the defendant, from confinement while he was on shore, without requiring him to give the seaman's bond, conclusively shows that the Government dealt with him, not as a seaman, but as a person charged with a crime, and who had executed a bond permitting him and requiring him to remain at all times to obey the orders of the Court in which he stood charged with offense.

II. Bond has been Exonerated.

But whether or not the bond was void *ab initio* the Government itself, the obligee in the bond, has by its acts and conduct prevented the fulfillment of the terms of the bond, and has therefore exonerated the bondsman.

While the trial Court based its decision on one ground, the reviewing Court will, of course, consider all the questions involved; and in this case one of the grounds urged in the motion of the bondsman was that, the conduct of the Government has relieved them of further liability on the bond.

It is a well known rule, and has often been held by the courts, including the Supreme Court of the

United States, that there are three things which will exempt sureties from liability upon a bond: first, the act of God; second, the act of the obligee, and third, the act of the law.

In the case at bar both the second and third principles named support the ruling of the District Court. The act of the obligee in consenting to accept a bond for the release of the defendant, Ah Fook, was a pledge upon the part of the Government that Ah Fook should remain unmolested within the jurisdiction of the Court, except for some other offense which he might possibly commit; at the same time, the Government declaring by its laws and by the construction thereof given by the Courts, that he could not remain without violating the laws of the United States, and leaving himself amenable to seizure and deportation. No more than an individual can the Government breathe hot and cold. The spirit of the bondsmen's obligation was that Ah Fook would at all times be ready to appear and answer the charge against him. The acceptance by the Government of that bond was a pledge that the Government would not, either by law or act, render it impossible or more difficult for him to abide the order of the Court, and the showing made by appellees uncontroverted by

the Government, is that the act of the Government, and that alone, rendered impossible the fulfillment of the terms of the bond.

Upon the giving of this bond, Ah Fook returned to his employment on the steamship "Shawmut." While his arrest and detention on shore had undoubtedly suspended his contract of employment, and would have terminated it had the master of the vessel been so minded, Ah Fook felt a moral as well as a legal obligation to resume his employment, and he did so, going with said vessel on its return trip to Hong Kong. This he had a perfect right to do with or without the knowledge or consent of the Government officials. It is well to note, however, that he had such sonsent. The affidavit of the appellee, Chin Kee so states, and is not denied by any of the Government officials except the United States attorney, who says he was not even present at the time the bond was given. The record shows, (pp. 12-13, 15-17) that the United States commissioner and United States Marshal and the Customs Inspector who swore to the complaint, were present at the hearing and when the bond was given, and they make no denial of their knowledge of the fact that the purpose of Ah Fook in giving the bond was that he might resume

his employment on the "Shawmut." When the vessel reached Hong Kong, Ah Fook was discharged and he and his bondsmen then set about in an effort to procure his return with an energy and persistence which should have met with the co-operation and received the commendation of the Government instead of the institution of these proceedings which they are now facing. As might naturally be expected no vessel would consent to ship Ah Fook as a seaman to this port because these proceedings would prevent his making the return voyage. One steamship line finally consented to return him as a passenger and it was then that the Government stepped in and prevented his return. Unmindful of its obligation to these bondsmen, it required (1) that Ah Fook be returned as a seaman, (2) that the usual seaman's bond be given on his behalf, (3) that this bond be conditioned for his return to China at the termination of the case against him, and (4) that such return to China be at the cost of Ah Fook or his bondsmen, and without expense to the Government.

The Government seems now for the first time to have considered Ah Fook a seaman, and for that reason to have required a seaman's bond. Strictly construed a seaman's bond at this stage of the proceed-

ing would have been no more effective than at the beginning, as the purpose of such a bond is not to permit his remaining here indefinitely, but on the contrary is for the purpose of forcing his departure within thirty days. It would, indeed, have been a happy series of events which would have permitted Ah Fook to have found a vessel sailing for the port of Seattle due to reach there on the eve of his trial upon which he could have been so fortunate as to secure employment as a seaman. The fact is the Government through its officials named an impossible condition, to say nothing of the requirement that the bondsmen return him to China without expense to the Government after his trial, or at the expiration of his sentence if convicted, when the law requires that Chinese in such cases be deported at the expense of the Government.

It is not believable that the Government can be upheld in such a contention. The contract of sureties upon a bond is such that the adverse party cannot deal with the principal, either by contract or tortuously, so as to change the principle's relation to the sureties or to the obligation without the release of the sureties.

It has even been held that where the principal is prevented by his arrest and detention by the State from appearing and fulfilling the conditions of the bond, that the sureties are released.

Woods vs. State, 103 S. W. (Tex.) 895.

III.

It appears in the record that evidence was taken to show that the defendant, Ah Fook, had died since his return to China, and that it was therefore impossible for his sureties to produce him, and that by the act of God they had been released from the obligation of their bond . A small portion of this evidence is containded in the record, but by the inadvertance or failure of the commissioner to file the evidence in the United States District Court before the action of the Honorable Judge therein proceeding in discharging the appellees from the bond, the same cannot be presented to this Court at this time.

It is therefore respectfully submitted that at the time of the execution of this bond, the defendant, Ah Fook, was not of any class of Chinese persons entitled to his liberty within the United States, and that the bond taken was so taken without authority of law, and was void; and that the efforts of the defendant

and of his bondsmen made in good faith to return the defendant, Ah Fook, into court to respond to the obligations of his bond, were rendered ineffective by the action of the Government itself, and prevented the return of Ah Fook and the fulfillment of the obligations of the bond.

We respectfully ask that the judgment and decree of the District Court be in all things affirmed.

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